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Condition féminine Canada

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Summary and Recommendations

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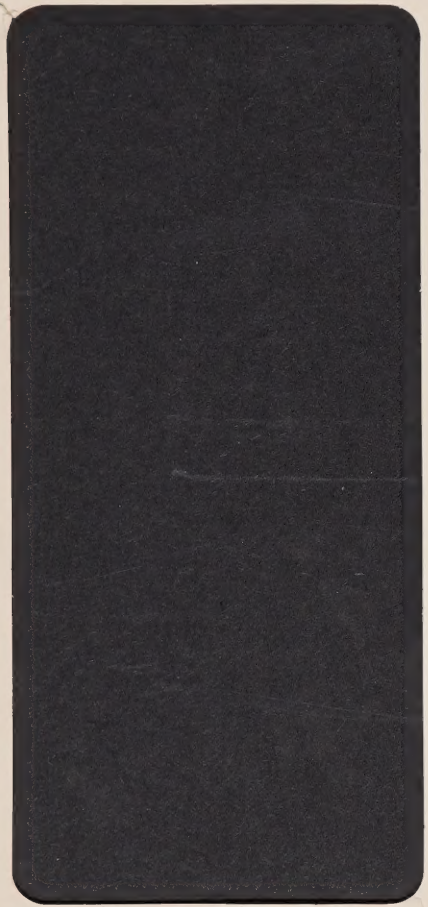

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KAREN L. BRIDGE

ACKNOWLEDGEMENTS

This study is based on a review of the Canadian and international literature on the public and private law maintenance of single-parent families, which began in January, 1984. Seven countries were selected for further study - Sweden, Finland, Denmark, Switzerland, Israel, New Zealand and the United States of America.

The author is indebted to officials of the Canadian missions abroad, and the Department of External Affairs, Social Policy and Programs Division, who were most co-operative and diligent in acquiring not only legislative and secondary materials otherwise unavailable, but in interviewing government officials in these countries to obtain additional information. Without the co-operation of both the Canadian officials and their foreign counterparts, this study would not have been possible. The final documents and information were received in January, 1985. Translation services were provided by Secretary of State Canada.

The author also wishes to thank Professor Alistair Bissett-Johnson of Dalhousie University and Professors Ethel Groffier-Atala and Bartha Knoppers of McGill University for their comments on the draft of this paper. Their suggestions were very helpful in the revision and editing process.

This paper was prepared for, and with the financial assistance of Status of Women Canada. The views expressed are those of the author and do not necessarily represent the views or policy of Status of Women Canada or the Government of Canada.

This paper provides only part of the information received from the countries under study. Detailed descriptions and analysis of the programs considered, as well as the original material, are available for consultation, upon appointment, by contacting:

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Catalogue no. SW21-8/1986E
ISBN 0-662-14619-0

Egalement disponible en français sous le titre 'Une comparaison internationale du droit privé et public régissant le soutien des familles monoparentales; sommaire et recommandations', no. de catalogue SW21-8/1986F, ISBN 0-662-93675-2

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FOREWORD

TERMS OF REFERENCE

This study examines current trends in international family law for three purposes:

i) to discover and evaluate the success of alternate ways of establishing support levels, particularly for children, on family breakdown;

ii) to examine and evaluate the maintenance enforcement process in several countries to identify alternatives which could be considered for adoption in Canada to improve the success of maintenance enforcement; and,

iii) to examine and evaluate the success of public law intervention in the economic lives of single-parent families in several countries.

Part I of this paper provides background information relating to the economic situation of single-parent families in Canada. It briefly examines the problems in the awarding and enforcement of maintenance orders, and competing theories as to why the default rate for maintenance debtors is so high. The constitutional problems which must be faced in any attempt to deal with these problems are also outlined, as well as current federal-provincial initiatives for reform and a very brief look at the present role of public support for single-parent families.

Part II outlines several countries' policies and programs for single-parent families. Examined are jurisdictions with specific public maintenance programs and jurisdictions which priorize enforcement and have developed aggressive enforcement strategies. Part II also discusses alternative suggestions for aiding single-parent families -- family insurance plans and benefit and tax schemes.

Part III consists of proposals for reform or further study which are suggested from the review of jurisdictions examined in Part II.

INTRODUCTION

The problems associated with establishing fair and adequate levels of maintenance on family breakdown and with defining the appropriate role for the state to play in both the enforcement of private maintenance obligations and in public economic intervention in the life of the single-parent family are ones being grappled with by most western nations today.

Establishing support levels is highly problematic. However, there is a clear trend in several jurisdictions towards the adoption of objective, mathematical type criteria to establish maintenance obligations. For example, as recently as August, 1984, the United States passed legislation requiring every state in the union to establish child support guidelines by October 1, 1987. Other jurisdictions already have objective guidelines in place, overseen by administrative agencies.

Maintenance enforcement is increasingly being undertaken by the state. In some jurisdictions, this has been so for some time. There are two motivations for doing this. On the one hand, there appears to be a recognition that the task is too complicated and expensive for the limited resources of maintenance creditors. On the other hand, the state has an element of self-interest, co-extensive with its intervention by default in the financial support of single-parent families. In some jurisdictions examined in this paper, the enforcement process is given a high priority for the dual purpose of recovering public monies spent due to maintenance defaults and of reducing public spending as much as possible through aggressive enforcement tactics. The enforcement process in other jurisdictions is less resource-oriented. It is a necessary adjunct to public maintenance programs. However, there is a different perception of the role of the state in the support of single-parent families and enforcement is not necessarily viewed as being the principal or the most appropriate source of funding for public maintenance programs. Only one jurisdiction examined expects its public maintenance program to be completely fuelled by the enforcement process.

There is an increasing trend towards adopting some form of public support for single-parent families in the form of a social security benefit or income supplement distinct from social assistance or welfare payments. In its most restricted form, this benefit replaces maintenance which is defaulted upon up to a specified maximum amount. The broader public programs for single-family maintenance provide a universal guaranteed minimum income for children in single-parent families not only in the event of default but so that even where maintenance is being paid but falls below a level the state feels is inadequate to support the child, the

child receives a regular benefit which will ensure him/her of a reasonable standard of living. This benefit is also distinct from and in addition to family allowance.

This paper looks to solutions which other countries have developed in response to these common problems in some detail, in the hope that the experience of these countries may provide some new and creative ideas for Canadian policy-makers to consider adapting to the Canadian context.

PART I

THE SINGLE-PARENT FAMILY IN CANADA

Chapter 1 OVERVIEW

(a) The Economic Consequences of Family Breakdown in Canada

Almost one in every four marriages in Canada ends in divorce.(1) Many other families suffer a permanent breakdown without divorce and a large number of unmarried couples with children also separate, leaving hundreds of thousands of women and children to face the disastrous economic consequences of family breakdown. Statistics show that it is the women and their dependent children who suffer the most economically on family breakdown.

Single mothers made up 82.6% of all single parents in 1981. There were almost 590,000 single mothers as opposed to 124,000 single fathers in that year.(2)

The estimated average income for female-headed families in 1982 was $17,923. This figure was $34,230 for male-headed families while the figure was $32,435 for all families. The incidence of low income in female-headed families was 45.4% as compared to 10% for male-headed families.(3)

A recent Canadian study revealed that more than 52,000 Ontario mothers with dependent children received financial support under the province's Family Benefits Allowance program in the 1982/83 fiscal year at a cost of more than $300 million. This study estimated that Canadian taxpayers contribute more than $1 billion annually to support these mothers and their dependent children.(4)

Maintenance awards do not significantly improve the lot of single-parent families for two reasons. Firstly, during marriage or cohabitation a large share of each parent's income goes towards family, as opposed to personal expenses. However, after family breakdown, support awards tend to be very low. Estimates range from less than 20% to 30% of the maintenance debtor's income. Therefore, while the dependent family's income and standard of living plummet on separation or divorce, that of the maintenance debtor often actually increases.(5) Secondly, maintenance default rates are very high. Although there is a lamentable dearth of accurate statistics available in Canada, with respect to default rates, one Alberta study showed that only 38% of maintenance debtors studied in Edmonton and Lethbridge had made all of their payments.(6)

The consequence of all these factors is that many single-parent families in Canada are forced to rely on

social assistance to survive. The economic and social consequences for both these families and the country as a whole are grave.

(b) Maintenance Defaults -- Competing Theories

Competing theories as to the reasons for maintenance default are: (i) inability to pay and (ii) refusal to pay by maintenance debtors.

(i) Inability to pay

A British Columbia study by Wachtel and Burtch which questioned whether high default rates might indicate awards were being set at unreasonable levels found that most excuses for non-payment did not stand up to serious scrutiny. However, the study did find that certain debtors clearly saw it in their best interests to neglect family obligations, as opposed to business obligations. This was because maintenance enforcement does not have the same personal consequences for the maintenance debtor in the form of debt collection, restricted credit and so forth.(7) Wachtel and Burtch noted that the court studied tended to work with a few simple premises in awarding maintenance rather than becoming involved in detailed accounting disputes. Wachtel and Burtch concluded that the effect of this approach was to strongly prejudice the best interests of the children, because the court accepted the notion that the debtor's income went first to support himself and maintenance payments thus come out of residual income.(8)

(ii) Refusal to pay

If support orders are fair in that they accurately reflect the debtor's ability to pay and are varied when justified by changes in the debtor's financial circumstances, failure to pay is generally equated with a refusal to do so. However, there may be complex emotional and psychological reasons underlying the refusal to pay.(9)

The Alberta study noted, supra, examined several factors(10) to determine why some debtors defaulted and others did not. None were conclusive. However, the response to questions asked of irregularly paying debtors did show that withholding support may be being used as a way of punishing ex-spouses. Approximately 44% of these debtors believed that the money paid for child support was going to the ex-wife. Other responses seem to confirm that the bitterness associated with the breakdown and a less than complete understanding of how support awards were made and expected to be paid.(11)

Refusal to pay may, however, also reflect the supporting parent's rejection of the priorities the courts assign

to the claims on his/her financial resources. The claims of sequential families cannot be realistically ignored in a society where divorce occurs at a relatively young age.(12)

The Report of the Committee on One-Parent Families (England) contained an extensive examination of the situation of single-parent families. In its 1974 report, commenting on the situation in Magistrate's Courts which deal mainly with low-income families, the Finer Committee concluded, inter alia, that the root of the hardship was not the unwillingness, but the inability, to support their first families.(13)

(c) Fixing the Level of Support

The appropriateness of aggressive enforcement necessarily depends on the basic justness of the maintenance debtor's obligation.

There is considerable concern expressed about fixing maintenance awards in the adversarial context of the courtroom or of legal negotiations. The criteria are generally need and ability to pay. However, both criteria are vague and undefined and, ultimately, are decided at the discretion of the individual judges. Concerns centre on how need can be accurately determined without definitions or calculations of basic needs for different age groups, in a particular regional and economic climate. Ability to pay is, as we have seen above, an unresolved question of priorities which is aggravated in circumstances where debtors deliberately avoid work or are underemployed to thwart their maintenance obligations. Some jurisdictions have turned to the use of objective formulae or financial guidelines to assist in calculating awards, often determined through an administrative as opposed to a judicial process.

The principal objection to the use of mathematical formulae in the calculation of support awards is that the factors which figure in marriage breakdown are so varied and complex that simple formulae cannot be applied to every separating family. There is a fear that guidelines will prove too rigid and that the necessary exceptions will quickly destroy the rule. It is also feared that reducing the calculation of support awards to an administrative process may lead to additional delays in establishing support because of the necessity for a procedure for appeal to the courts. Nonetheless, serious attempts are being made in several jurisdictions to develop fair and flexible guidelines.(14) In this paper, Sweden and Michigan provide examples of the use of guidelines in the calculation of private law maintenance.

(d) Enforcement of Maintenance Obligations

As mentioned, supra, while the exact default rate in maintenance orders in Canada cannot be readily ascertained, it is clearly very high. A significant factor in these high default rates is the difficulty in enforcing maintenance orders. Presently, in eight out of ten provinces, the maintenance creditor is obliged to pursue the legal remedies without assistance from the state. Only in Manitoba is there a state-initiated enforcement program which entirely removes the burden of enforcement from the maintenance creditor with a court order for maintenance. In Quebec, the 'Service de perception' provides a free enforcement service; however, this enforcement process must be initiated by the maintenance creditor when court-ordered maintenance is not received. Several provinces are currently examining the possibility of establishing state-initiated enforcement programs.

The civil legal remedies available are not uniform across the country. They include: continuing garnishment, the use of fines, writs of execution, warrants of distress or seizure of chattels, the registration of maintenance orders against real property, the use of security deposits or bonds and the appointment of a receiver to enforce maintenance obligations. Imprisonment is also available as a last resort in almost all provinces.(15)

The enforcement of legal remedies is made even more difficult where the maintenance creditor is trying to enforce an order against a maintenance debtor residing in another province or territory. The reciprocal enforcement of maintenance orders (REMO) legislation is cumbersome and time-consuming, requiring the maintenance creditor to apply to the Attorney-General of the province in which he/she is living for transmission of the order to the Attorney-General of the province in which the maintenance debtor resides. The onus remains on the maintenance creditor to initiate the enforcement process.

Enforcement cannot be taken either intra- or inter-provincially if the maintenance debtor cannot be traced. Not all provinces/territories provide tracing information, nor does the federal government. However, Bill C-48 (Family Orders Enforcement Assistance Act) proposes the release of tracing information from information banks controlled by the Departments of National Health and Welfare and by the Canada Employment and Immigration Commission (clause 15).

Where state-initiated enforcement programs do not exist, maintenance creditors often cannot seek enforcement without legal aid assistance. Stringent provincial/territorial eligibility requirements and generally low funding of

civil legal aid matters pose substantial obstacles to securing this assistance.

Legal aid is not guaranteed by law and eligibility requirements vary considerably across the country. Financial eligibility is not always the sole qualifying requirement. For example, in British Columbia where the provincial restraint program has cut deeply into legal aid funding, applicants must not only meet the financial eligibility criteria but also demonstrate that their situation is one of some urgency.

Legal aid programs across Canada are under severe financial pressure. The Canadian Bar Association has expressed concern that provincial compliance with the minimum standards under the adult criminal federal-provincial agreements threatens to drain limited provincial funds from civil coverage.(16)

An evaluative study of the B.C. Legal Aid program notes that prior to the institution of the provincial restraint program, family tariff clients were more likely to be female.(17) Thus, cutbacks in provincial funding of family-related legal aid matters affects women disproportionately.

An increased strain on legal aid funding occurs in times of economic recession and high unemployment. The numbers of financially eligible applicants increases at the same time as government spending is reduced through restraint measures.

For legal aid applicants, the consequences of their failure to qualify for eligibility and of generally inadequate funding for civil legal aid are that rejected applicants go without legal representation. This was the case for an overwhelming majority of rejected family legal aid applicants in the B.C. study noted supra.(18)

A further consequence of restraint measures is that low income people are deterred from applying for assistance. A Manitoba study(19) noted that this deterrent effect in Manitoba was general; i.e., people from all income levels and with all types of legal needs were deterred from applying for assistance.

(e) Constitutional Considerations

Federal jurisdiction in family law matters relates only to divorce and the capacity to marry under s.91(26) of the Constitution Act, 1867. With the exception of the federal power to enter the family law field through its criminal jurisdiction to deal with issues such as juvenile delinquency (s.91(27)), the basic parameters of family law are within

provincial jurisdiction under s.92(13), the authority to regulate property and civil rights.(20)

There is considerable scope for federal-provincial conflict in a number of overlapping areas, generally due to the potential conflict between the federal divorce law and provincial laws relating to children, to support between family members, and the enforcement of support orders.(21)

Federal and provincial definitions of 'child' vary. While the provinces have traditionally controlled matters relating to children through their parens patriae jurisdiction, the federal authority may determine support obligations to children as an ancillary power to the Divorce Act. Where federal legislation is valid as ancillary, provincial legislation is valid but inoperative when there is a conflict between valid federal and provincial legislation.(22)

There is a view which holds that under a strict application of the doctrine of paramountcy, the field of support consequent to divorce proceedings is exclusively federal. The more flexible view holds that concurrency is possible between federal and provincial legislation.(23)

Although the provinces have legislative authority over the administration of justice, the federal government has concurrent jurisdiction over matters substantially within its legislative competence. Thus enforcement of support orders given under the Divorce Act provides potential for conflict and lack of uniformity across the country. One view holds that the jurisdictional scheme of the Divorce Act is either avoided or violated when provincial courts of summary jurisdiction enforce federal support orders, although this process has been upheld.(24)

Further constitutional problems arise because of the limited powers of inferior courts which cannot perform s.96 functions such as making orders for possession of the matrimonial home or non-entry orders(25), although they may award maintenance under provincial statutes.

The present inability of any court (other than the Superior Court which made the original order for maintenance under s.11(2) of the Divorce Act) to vary that order is also problematic, particularly in a mobile society.(26)

Bill C-47, the proposed Divorce and Corollary Relief Act, seeks to resolve these enforcement and variation problems. Proposed section 20 would give corollary relief orders legal effect across Canada and provide for their registration in any court (as defined in the Act) in a province. These orders could then be enforced as an order of that court or in any other manner legislated by the province. Variation applications would be heard and

determined where either former spouse is ordinarily resident or in an agreed forum, with a two stage process where the applicant and respondent reside in different jurisdictions.

(f) Federal Policies Affecting Family Support

1. The Federal-Provincial Committee on Enforcement of Maintenance and Custody Orders

In 1981, the Federal-Provincial Committee on Enforcement of Maintenance and Custody Orders was established to evaluate enforcement techniques across Canada in the hope of taking the best elements from those available and introducing them in a uniform way across Canada. The final report was published in June, 1983.

While the Task Force recommendations represent a concerted effort to move in the direction of standardizing enforcement techniques in Canada, these recommendations in themselves cannot solve many of the problems relating to the enforcement of maintenance. The report does not deal with the underlying problems relating to the principles of awarding maintenance and the interaction of private law maintenance with the public law maintenance system as embodied in federal, provincial and municipal assistance programs.

2. Federal Review of Social Security Benefits

In January, 1985, the federal government released a consultation paper on Child and Elderly Benefits as part of its review of social benefits. Proposals for change in the child benefit system focussed on the child tax exemption.

In the May, 1985 federal budget, changes in the family allowance and tax system(27) intended to increase support for low-income families by restructuring benefits provided to families with children. Over a three year period, beginning with the 1986 taxation year, the child tax credit paid to low- and middle-income families will be increased. The credit will be indexed to the amount of annual Consumer Price Index increase that exceeds 3%. Beginning in the 1986 taxation year, the family income level above which the child tax credit is reduced will be lowered to $23,500 and will in future years be indexed to the annual CPI increase above 3%. Family allowances will also be indexed at this rate beginning in January, 1986.

The child tax exemption for dependent children will be reduced in three annual steps starting in 1987 until it equals the value of family allowances. The exemption for children 18 and over will be reduced in the same way as the exemption for children under 18. However, there will be no exemption reduction for mentally or physically infirm

dependents. The tax exemptions for these dependents will be indexed annually to the CPI increase above 3%.

(g) The Report of the Macdonald Commission on the Economy

The Final Report of the Royal Commission on the Economic Union and Development Prospects for Canada (the Macdonald Commission) was released on September 5, 1985. Among the broad range of recommendations made by the Commission was the proposal to replace federal programs such as the family allowance, child tax credits, married and child exemptions, federal social housing and the federal portion of social assistance payments with a Universal Income Security Program (UISP) or guaranteed annual income. Recipients would receive a relatively low level of support but would also be taxed at a fairly low level. The Commission stated as an immutable fact that higher benefits cannot be provided to those at the bottom of the income scale without reducing net incomes at the middle and higher levels.(28) The Commission maintains that a UISP 'would not provide a payment high enough to encourage employable people to rely wholly on it, and it would not tax back benefits at a rate high enough to discourage the earning of income.'(29) The Commission recommendations are under consideration.

(h) Public Law Support of Single-Parent Families in Canada

As noted supra, the state already plays a major role in supporting single-parent families in Canada through subsidizing or providing benefits such as family allowances, public housing and various tax exemptions and credits. The last resort for many of these families is social assistance. Almost 20% of the women in the Alberta study referred to in Chapter 1(a) cited social assistance as their main source of income.(30) There is, in effect, a dual system of family support: one private and one public.

Despite the constant interaction of the private and public support systems, they are not well integrated. Each tends to operate in an independent manner, virtually ignoring the existence of the other. This places the courts in an awkward and unrealistic position when making maintenance awards. The courts are neither fully apprised of all the facts, nor are they fully aware of the impact their decisions may have on the applicant's eligibility for various public support programs. This situation has been deplored by eminent Canadian jurists and academics for some time.(31)

Not only are the private and public support systems poorly integrated, but the social welfare system itself is highly complex, with various income security programs divided among federal, provincial and municipal levels of government.

The social policy rationales which underlie the system are also complex and, often, conflicting.(32) There is a growing concern that the realities of Canadian society are not being reflected in social welfare programs. Mossman and MacLean point out that although the principles of equality and self-sufficiency or independence have evolved in Canadian family law, this approach 'fails to achieve effective equality because male and female spouses are not similarly situated on divorce or marriage breakdown, particularly in relation to financial security.'(33) Although social welfare programs have, to a certain extent, replaced family support, Eichler,(34) Mossman and MacLean express concern that the relation between individuals and the family is unclear.(35)

Mossman and MacLean outline a theory distinguishing two categories of social welfare: benefits which are available to the 'deserving' poor and those available to the 'undeserving' poor. The former tend not to be means-tested and are often work-related, such as unemployment insurance or workers' compensation. The latter do tend to be means-tested and are in the nature of a charity, for those who do not work.(36) It is becoming clear the the 'deserving' poor are more often men, while the 'undeserving' poor are more often women.(37) Work-related welfare programs tend to disregard family support in determining eligibility, thus treating men as individuals. However, charitable type benefits tend to be granted only where there is no family support and women are thus more often treated as part of a family unit, rather than as individuals for social welfare purposes.(38) Eichler, in commenting on this dichotomy, notes that to the degree that social security programs are available to individuals, they are guaranteed of some income security. However, when family status determines eligibility, individuals become disentitled from access to social support because of this status.(39) Mossman and MacLean express the concern that because the welfare system starts with a presumption of familial support, whereas the family law system presumes equality and independence (which, practically speaking, is often quite unrealistic), it is the woman who will suffer 'delay, frustration and hardship before the systems 'mesh', if they do at all.'(40)

The Finer Committee found a similar, fragmented approach of the support systems for single-parent families in England. Among their recommendations were the use of unified family courts, the assessment and collection of maintenance through administrative orders against 'liable' relatives and the provision of a guaranteed maintenance allowance for single-parent families set at higher levels than the supplementary benefit program.(41) Although the Finer Committee recommendations have remained virtually ignored in Britain, the financial position of single-parent families there remains critical.(42)

Footnotes

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5. Chambers, David L., Making Fathers Pay: The Enforcement of Child Support. (Chicago: University of Chicago Press, 1979) at p.48.

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8. Loc. cit.

9. See Cassetty, Judith, (ed.), The Parental Child-Support Obligation. (Lexington, Mass.: D.C. Heath and Company, 1983), particularly at Part IV. For recent American data which appears to refute the theory that support compliance can best be achieved through vigorous enforcement of visitation rights and that support is not paid because visitation is obstructed or otherwise wrongfully denied, see Weitzman, Lenore, J., The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America. (New York: The Free Press/MacMillan, 1985); Greif, Geoffrey, Single Fathers. (Lexington Books, forthcoming, 1985); Haskins et al., Estimates of National Child Support Collections Potential and the Income Security of Female-Headed Families, Final Report, Grant No. 18-P-00259-4-0-01, Office of Child Support Enforcement, January 1, 1985; Meurer and Musil, Public Enforcement

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10. Supra, footnote 4, at pp.112-117.

11. Loc. cit.

12. For a detailed examination of this issue, see Payne, Julien, The Formation of New Relationships: Present and Prospective Judicial and Legislative Responses in Payne, Julien D., Steel, Freda M. and Bégin, Marilyn A., Payne's Digest on Divorce in Canada. (Don Mills: Richard De Boo Publishers, 1983), at p.82-741 ff.; Weisman, Norris, The Second Family in the Law of Support (1984), 37 R.F.L. (2d) 245; Fodden, Simon R., Poor Relations: The Effect of Second Families on Child Support (1980), Can. J. Fam. L. 207.

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15. See the Final Report of the Federal-Provincial Committee on Enforcement of Maintenance and Custody Orders in Canada, June 7, 1985. For a discussion of the weaknesses in the available remedies, see Steel, Freda M.,

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21. See generally, Abols, Imants J., Custody and Maintenance: The Role of Provincial Legislation for Divorced Families (1980), 3 Can. J. Fam. L. 403; Bushnell, S. Ian, Family Law and the Constitution (1978), 1 Can. J. Fam. L. 202; Colvin, Eric, Family Maintenance: The Interaction of Federal and Provincial Law (1979), 2 Can. J. Fam. L. 221; Colvin, Eric, Federal Jurisdiction over Support after Divorce (1979), 11 Ottawa L. Rev. 541; Payne, Julien D., Maintenance Rights and Obligations: A Search for Uniformity (1978), 1 Fam. L. Rev. (Pt.I) 2; (Pt.II) 91; (Pt.III) 185.

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30. Supra, footnote 6, Table 2, at p.148.

31. For an expanded discussion of this subject, see Wilson, Bertha, The Variation of Support Orders in Family Law, Dimensions of Justice, selected papers presented at the Judicial Conference on Family Law, 1981. Abella, Rosalie S. and L'Heureux-Dubé, Claire (ed.) (Toronto: Butterworths, 1983) at pp.60ff. and Payne, Julien D., Public Law Alternatives to the Private Law System of Income Support for Family Dependents (1982), in Payne, Julien D., Steel, Freda M. and Bégin, Marilyn A., Payne's Digest on Divorce in Canada. (Don Mills: Richard De Boo Publishers, 1983), at p.82-815ff.

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33. Mossman, Mary Jane and MacLean, Morag, Family Law and Social Welfare: Toward a New Equality. Draft discussion paper presented to the Family law Section, Canadian Association of Law Teachers, Kingston, Ontario, April, 1985.

34. Supra, footnote 32.

35. Supra, footnote 33, at p.29.

36. Ibid., at pp.29-30.

37. Loc. cit.

38. Ibid., at p.32.

39. Supra, footnote 32, at p.110.

40. Supra, footnote 33, at p.33.

41. Report of the Committee on One-Parent Families (England), Cmnd. 5629, 1974.

42. See: Financial Provision and the Welfare of Children (1983), 133 New Law Journal 1053.

PART II

A SURVEY OF PRIVATE AND PUBLIC LAW MAINTENANCE SYSTEMS

Introduction

Part II begins with an examination of jurisdictions which have sought to resolve the economic problems of single-parent families, in whole or in part, through the substitution of largely administrative procedures for judicial processes and with an expanded role for public support of these families recognized through the establishment of public maintenance advance systems (PMAS). The PMAS countries examined are: Sweden, Finland, Denmark, Israel and Switzerland. Part II also looks at New Zealand's Liable Parent Contribution Scheme which closely resembles a PMAS and demonstrates a clear government policy to integrate private and public support systems.

This is followed by a discussion of those jurisdictions which have concentrated on the development of aggressive enforcement procedures in an approach which gives primacy to the private support system and puts a strong emphasis on recuperating public resources where expended. These jurisdictions include the United States, and particularly the State of Michigan, and the Province of Manitoba. Part II also reviews the benefit and tax scheme developed in Wisconsin.

Finally, family or marriage insurance schemes are discussed.

Public Maintenance Advance

A public maintenance advance is a guaranteed periodic payment to children whose private support obligations are not or cannot be met. Theoretically, the payment is an advance on the private obligation which the state subsequently seeks to collect. However, in practice, enforcement of the private obligations is not always possible. Thus the maintenance advance provides a guaranteed minimum income to these children.

In order to assist the reader in distinguishing between a maintenance advance and social assistance-type benefits, the following chart attempts to summarize the principal features of maintenance advance programs.

Distinction Between Public Maintenance Advance and Family Benefits/Social Assistance

PUBLIC MAINTENANCE ADVANCE SYSTEM	FAMILY BENEFITS/SOCIAL ASSISTANCE
1. The state accepts in a clearly enunciated policy that it will take primary responsibility for the economic support of single-parent families, but only where private support is either unavailable or inadequate.	1. The state acts in a secondary role to supplement the income of the single-parent family. The supporting parent is still regarded as having the prime responsibility to support the family. The level of state support is generally low.
2. Public maintenance advance programs are generally for the support of children, although some make provisions for unsupported mothers of dependent children.	2. Support is generally available to a person in need who is the parent of a dependent child.
3. The preconditions to eligibility are not exclusively economic hardship. The most comprehensive maintenance advance program provides a benefit in the form of a universal, often tax free guaranteed minimum income for children, without regard to the actual assets or resources of either the custodial parent or the child. The advance is available as a right to single-parent families with children under a specified age.	3. Qualifying conditions are usually exclusively economic. Administrative discretion will play a role in deciding eligibility and there is usually on-going administrative monitoring of the family situation to ensure continued eligibility.

PUBLIC MAINTENANCE ADVANCE SYSTEM	FAMILY BENEFITS/SOCIAL ASSISTANCE
4. The State takes an assignment of the applicant's rights and becomes the agent of enforcement in both welfare and non-welfare cases. In advance systems, the State will also enforce for amounts above what is paid out as an advance benefit. The State administers and monitors payments and takes automatic enforcement proceedings against a defaulting support debtor. The custodial parent may have a right complementary to that of the State to take private enforcement proceedings but it is not primarily that parent's responsibility.	4. The State takes an assignment of the applicant's benefit and is entitled to take enforcement proceedings against the defaulting support debtor. The benefit recipient is often required or strongly encouraged to take private law enforcement proceedings and the enforcement burden thus often rests with the custodial parent and not the State. Since the State acts on an ad hoc basis in supplying family benefit assistance, it often has no universal continuing monitoring function. It only becomes implicated on the application for a family benefit and its interest is only in the amount of the benefit it pays out. (Note however that some non-PMAS jurisdictions such as Manitoba and Michigan provide state enforcement services to private maintenance creditors.)
5. The State may have significant input into determining the amount appropriate for the initial support order and this advisory function is integrated into the court order in such a way that there is not a dual system for determining the noncustodial parent's ability to pay - the court and the social security systems will adopt the same standard.	5. Only after default by the maintenance debtor does the welfare system become involved. The determination by the family benefits office of the noncustodial parent's ability to pay may be quite different from that determined by the courts. These competing expectations will lead to confusion in enforcement.

PUBLIC MAINTENANCE ADVANCE SYSTEM	FAMILY BENEFITS/SOCIAL ASSISTANCE
6. In determining the non-custodial parent's ability to pay, second families are generally accorded priority on the basis that realistically, the non-custodial parent is more likely to take care of the family with whom he/she has day-to-day contact than the one he/she sees only periodically or not at all and trying to force him/her to do otherwise may injure both families. This means that the State accepts primary responsibility for the first family.	6. Particularly where the courts are implicated in enforcement, the responsibility to the first family is often held to be the primary responsibility of the non-custodial parent, although some courts do take sequential family relationships into account. Second families are a recognized responsibility but they do not always take precedence over the obligations to the first family.
7. The whole support process, from establishment of the initial support order, monitoring and distributing payment and automatic enforcement, may be conducted almost entirely by one administrative organ or agency. The courts are usually available, however, for resolving justiciable issues such as the variation of support orders and appeals from the administrative process.	7. The support process is fragmented between the courts and the social assistance agencies. The non-custodial parent may also be expected to take an active role in the enforcement process. Resort to the courts may be frequent where funds permit, but the necessity for court intervention may also discourage the custodial parent from pursuing the maintenance debtor and result in greater reliance on social assistance, especially where maintenance orders are small.
8. Enforcement procedures may never or rarely make use of the courts. The enforcement is often by way of prospective income withholding orders, wage assignments or similar techniques and access to government information banks for tracing purposes is usual and quite broad.	8. Enforcement is generally through the courts. The agency administering the family benefit has no legal authority to interfere directly with the non-custodial parent's source(s) of income without an order to do so. There may or may not be access to government data banks.

PUBLIC MAINTENANCE ADVANCE SYSTEM	FAMILY BENEFITS/SOCIAL ASSISTANCE
9. These systems generally use an integrated computer system to record data, provide the monitoring function and provide ready access to information for tracing.	9. No uniform data collecting processes are used. Data collected are often for the purposes of one local office. The limited scope of the agency's interest similarly limits the information collected.

Chapter 2 PRIVATE AND PUBLIC SUPPORT IN THE PMAS COUNTRIES: SWEDEN, FINLAND, DENMARK AND ISRAEL

Introduction

Public maintenance advance systems (PMAS) originated in the Scandinavian countries(1) and have spread and been adapted to the social security systems in other countries. The most comprehensive system is in Sweden and it is dealt with in some detail in this chapter. because of their similarity to the Swedish PMAS, those in Finland, Denmark and Israel are outlined in more abbreviated form. The PMAS in Switzerland is examined separately in Chapter 3. It differs significantly from the advance benefits discussed in this chapter, and it also raises constitutional issues which are quite similar to those which would be raised in the Canadian context.

2.1 SWEDEN

2.1.1 The Private Law System of Maintenance

2.1.1 (a) Inter-spousal Support

Unmarried cohabiting couples have no maintenance obligations during or after cohabitation.(2) Spouses have a right to alimony on divorce(3) but it is intended to be transitory or rehabilitative in nature and is considered exceptional.(4) The basic thrust of the law is for the spouses to support themselves after divorce. The exceptional nature of alimony has been attributed to the participation rate of Swedish women in employment outside the home.(5) In 1978, 59% of all female-headed families were employed full-time outside the home, 16% half time or more and only 14% did not work outside the home at all.(6) The role of extended state benefits is also significant (see discussion infra).

2.1.1 (b) Private Law Maintenance of Children

The maintenance of children is shared between the parents who are responsible for 'reasonable maintenance'. Not only the parents' resources but the child's income, assets and social benefits are considered in making awards. Maintenance generally terminates at age eighteen.(7) Step-parents have a secondary responsibility to biological parents.(8)

A statutory formula has been developed to calculate child maintenance payments.(9) Many of Sweden's social security benefits are calculated by reference to a 'basic sum' -- an indexed sum corresponding to the annual income equivalent to the national old age pension.(10) In May, 1984, the

basic sum was 20,300 Swedish kronor (then approximately $3,260 Canadian dollars).

The starting point for calculating a child's maintenance allowance is the set of guidelines issued by the National Board of Health and Social Welfare. These incorporate the cost-of-living for children for the ages of 0-6, 7-12, and 13 and over. These are expressed as percentages of the basic sum. The general state child allowance is deducted from these amounts, leaving the maintenance required by the child.(11)

The debtor parent is allowed to deduct a 'reserved amount' for his maintenance plus reasonable housing costs. A further amount may be claimed for the support of a second family, thus effectively giving that family the priority claim on his financial resources.(12) Similar deductions are made by the custodial parent although this is not expressly stated in the statute.(13) From the remaining incomes of the parents, the child support obligation is apportioned in the following manner:(14)

$$\frac{\text{remaining income of the father}}{\text{remaining income of the father + remaining income of the mother}}$$

x amount calculated for the child(ren)'s needs

= father's monthly payment

(amount calculated for the child(ren)'s needs) - (father's monthly payment)

= mother's monthly payment (Note: the mother is entitled to general child allowance.(15)

Further adjustments can be made up or down as specified in the legislation.(16) A child may receive a 'standard additional amount' where the parents are left with a significant surplus.(17) One commentator feels that although this legislation allows for more uniform levels of maintenance in comparable cases, the system is complicated and the mathematical exactness is determined by the evaluations chosen as starting points.(18) Payments are usually periodic and by law, payable in advance.(19)

2.1.1 (c) Indexing of Maintenance Allowances

Maintenance allowances are automatically indexed through calculations of the General Bureau of Statistics. There must be a minimum annual increase or decrease in monetary purchasing power of at least 5% to allow for change, although smaller amounts resulting in a 7% increase over 2 years will permit a corresponding allowance increase.

Children's allowances are limited to 70% of the indexed increase or decrease for spouses to prevent inequities in the taxation rules for debtors which would otherwise occur.(20) The responsibility for making the change is on the debtor. The change usually takes place on April 1st of each year. The government advertises and makes index change information widely available.(21)

2.1.1 (d) Duration and Variation of Private Law Maintenance Obligations

Maintenance obligations arise from both court orders and agreements. They can be varied in changed circumstances or on grounds of unreasonableness.(22) Maintenance actions are generally prescribed after 3 years as is the right to demand payment of arrears.(23)

2.1.1 (e) Enforcement of Private Law Maintenance Obligations

Sweden has a central execution authority (Riksskatteverket) which can execute for maintenance obligations.(24) Both garnishment and attachment procedures are available.

An enforcement officer takes applications, hears the debtor, decides on the deduction sum allowed to the debtor and takes the enforcement required.(25) The amounts available for maintenance attachment are calculated on the debtor's before-tax income less the deduction sum. Other forms of attachment are calculated on the debtor's after-tax income less the deduction sum.(26)

2.1.2 The Public Law Maintenance System

Subject to residency(27) and paternity(28) requirements, the maintenance advance is provided without regard to the child's income or assets(29) and the marriage or remarriage of the custodial parent does not affect the child's eligibility.(30) The advance is made against a claim on the non-custodial parent, known in law as the person liable to pay the maintenance allowance.(31)

Subject to special circumstances(32), the maintenance advance is 41% of the 'basic sum' stipulated for the year pursuant to the Act on National Insurance.(33)

The public maintenance advance is paid out as one of a large number of social security benefits and is presumably funded from general government revenues.

The National Insurance Office administers the maintenance advance through its local offices and takes enforcement against the debtors.

As long as the advance is being paid, the debtor must direct that part of his maintenance payments equal to the advance to the social insurance office where he/she is registered.(34)

2.1.3 Enforcement and the Maintenance Advance

Where the creditor fails to pay maintenance to the social insurance office as directed, the Act relating to Advance Payments on Maintenance Allowance, 1964 obliges the social insurance office to collect private maintenance without delay. The office is authorized to enforce for the allowance in excess of the maintenance advance on behalf of the custodial parent.(35)

2.1.4 Analysis of the Maintenance Advance: Cost-effectiveness, Problems and Benefits

In 1983, approximately 11% of all Swedish children and 53% of children in single-parent families (totaling approximately 220,000 children) were receiving maintenance advance payments.(36) The annual cost in 1983 of the advance was 1.9 billion Swedish kronor (approximately $304 million Canadian). Of that amount, 700 million kronor (approximately $112 million Canadian), or 36.8% was recovered from maintenance debtors.(37)

Approximately 27% of all families in Sweden are single-parent families (a total of about 310,128). Only 20% of social assistance recipients are single mothers. These single mothers represent less than 20% of all single mothers. These benefits are usually small and temporary; it has been found that two-thirds of these women receive social assistance for 3 months or less.(38) As noted in section 1.1.1, supra, there is a high rate of participation amongst these women in employment outside the home.

The maintenance advance is provided along with the general child allowance,(39) housing allowances(40) and the provision of other social services. A recent study by Kamerman and Kahn showed female-headed single-parent families were significantly better off than those in the other countries studied. In two types of female-headed single-parent families in which the mother was not employed outside the home, the family incomes were almost 94% of the average production worker's wage (APWW) in Sweden. The maintenance advance made up 28.6% of these families' income and social assistance accounted for 36.1% of income.(41) In the other two types of female-headed single-parent families where the mother worked outside the home, the family incomes were 123.1% of the APWW. There were no social assistance payments to these families. The maintenance advance was 21.8% of income where the father did not contribute to child support but only 10.5% where he did contribute (11.3%).(42)

The Swedish approach allows these working mothers to retain almost all of their net earned income. This provides a significant work incentive. The difference in income between a non-working single-parent family receiving social assistance and other benefits and a similar family in which the mother works part-time and earns half an APWW is 43%. The family retains almost the entire net earned income of the mother. Kamerman and Kahn attributed 85% of the income difference between these two working and non-working female-headed single-parent family models to the maintenance advance payments available to all single-parent families.(43)

Concern has been expressed over the fact that although maintenance allowances are indexed, all salaries are not.(44) Therefore, in periods of recession or high inflation, the maintenance debtor's obligation may well become too onerous, increasing a tendency to default and, correspondingly, a greater demand on maintenance advance funds.

Kamerman and Kahn's study demonstrates that the maintenance advance makes a significant difference to the income of single-parent families. In addition to children being cushioned from the effects of the debtor's default or inability to support his/her children, the maintenance advance guarantees a minimum income for those children of low-income debtors who cannot provide adequate child support. Kamerman and Kahn characterized the underlying principles in the maintenance advance program as being the concern for the well-being of children, for the parents' role in assuring this and the encouragement for mothers to work and earn.(45) That the state also looks after the enforcement of maintenance obligations is a further economic and emotional relief to these families.

2.2 FINLAND

2.2.1 The Private Law System of Maintenance

2.2.1 (a) Inter-spousal Support

Support obligations between married and unmarried couples in Finland are virtually identical to those in Sweden.(1)

2.2.1 (b) Private Law Maintenance of Children

The parents share the child support obligation according to their ability. The Child Maintenance Act, 1975 requires parents to provide 'sufficient support'. This criterion has been criticized as being too vague. The legislation does not incorporate 'consumption investigations' to indicate what is needed to satisfy a child's basic needs in the same way that Sweden has.(2) Factors such as the parents' age, employability and the child's ability or chances of self-support are considered.(3)

Children have a right to support until age 18 although it may extend beyond that for educational purposes.(4) Finnish law has abolished the right to maintenance for children who, although in need of assistance, are beyond the age of majority. Also, the right of parents to seek support from their children is no longer available.(5)

Statutorily specified allowances, including child allowances, and maintenance allowances are raised according to the annual increase in the cost-of-living index.(6)

Enforced collection for maintenance is by attachment which can be undertaken on the basis of a court order or confirmed agreement without further resort to the courts.(7)

The Social Welfare Board can seek enforcement (see, infra) where it pays a maintenance allowance (advance). The S.W.B. has the right to information from every government body, including that found in tax returns.(8)

2.2.2 The Public Law System of Maintenance

2.2.2 (a) Eligibility for the Maintenance Allowance

A maintenance allowance is paid to children under the Act on Child Maintenance Security, 1977/122 to safeguard children's rights to 'sufficient support'.(9) It is paid where there is no maintenance or where it is insufficient.(10) In the latter case, the difference between the child's allowance paid by the debtor and the state maintenance allowance or advance provides the children of low-income debtors with a guaranteed minimum income.

An allowance is paid by the state where:(11)

1) the maintenance debtor defaults;
2) paternity has not been established;
3) paternity is established, but not a maintenance obligation;
4) when a maintenance obligation exists but cannot be fulfilled due to the debtor's incapacity, or when the amount of maintenance established is less than the public allowance;
5) an adopted child was adopted by one parent whose spouse, legal or common law, is not the parent or adoptive parent of the child.

Additionally (12), the parents of the child must not be living together, and the debtor or parent referred to in 3) and 4), supra, must be alive. There are also residency conditions.(13)

2.2.2 (b) Determination of the Quantum of the Maintenance Allowance

Rather than being a fixed percentage of a 'basic sum' calculation as in Sweden, the Finnish legislation establishes graduated amounts to be paid out. In 1984, the child or a single supporter received 349 Finnish marks per month (approximately $76.78 Canadian). A child whose parent was married or cohabited received 291 marks per month (approximately $64.02 Canadian). The Ministry of Health and Social Welfare determines the annual increase which is tied to the cost-of-living.(14)

Amounts paid out vary, however, with the condition on which they were awarded. Where the debtor's obligation is less than the amount in the Act, the maintenance allowance (advance) paid out is the difference between the two. Where the debtor's obligation is lower than the allowance in the statute because either the child can contribute to his own support or because the debtor's expenses for the child are low and default occurs, the public maintenance allowance is limited to the amount of the debtor's obligation.(15) A partial payment of the private maintenance is deducted from any corresponding time period in which the public maintenance allowance is paid.(16)

2.2.2 (c) Funding of the Maintenance Allowance

The public maintenance allowance is paid out of municipal funds. However, 80% is provided by the central government.(17)

2.2.2 (d) Administration of the Maintenance Allowance

Agencies subordinate to the Ministry of Social Affairs and Health have a three-tiered administration: there is a national control administration, a regional and a local administration.(18)

An application can be made to the local S.W.B. by the custodial parent, including an underage parent, a guardian ordered to represent the child or a trustee.(19) Only one default is necessary before applying. The debtor is normally heard unless the child needs immediate support.(20)

The debtor's obligation is unaffected by the payment of the public maintenance allowance.(21) Where the debtor defaults, the municipality is subrogated in the child's rights to the extent of the public maintenance allowance paid. The child has the right to any excess above the amount of the allowance.(22) On default, the Board has the right to collect maintenance payments and as long as it has this right, the debtor must pay in to the Board.(23) If the debtor pays the applicant directly, both will be liable to repay the municipality.(24)

The Act on Child Maintenance Security, 1977/122, authorizes the Social Welfare Board to enforce for unpaid maintenance through garnishment procedures.(25) The Act allows for remission of the debtor's obligation where the debtor's default was caused by circumstances beyond his/her control.(26)

2.2.3 Analysis of the Maintenance Allowance: Cost-effectiveness, Problems and Benefits

Statistics indicate that, in 1983, 8% of approximately one million children under 18 received the maintenance allowance. The total paid out in 1983 was approximately 237 million Finnish marks (approximately $52.14 million Canadian) of which approximately 38% was recovered from maintenance debtors.(27) This is almost the same recovery rate as that achieved in Sweden (see 1.3, supra).

No further information as to administrative costs was provided. Generally, the maintenance allowance must also be viewed in the context of the assistance to single-parent families provided through tax benefits, day care, priority and reduced utility payments. The exact impact of the maintenance allowance cannot be evaluated without additional information. A 1980 government publication estimates that only about 4% of the population received social assistance(28) (now known as income security). What proportion of single-parent families need income security is not known. Clearly, receipt of the allowance must improve the single-parent family's standard of living.

2.3 DENMARK

2.3.1 The Private Law Maintenance System

Denmark has a dual administrative-judicial system for granting separations and divorces. Basically, the courts deal with the contentious cases and the local administrative authority, the County Governor, deals with the non-contentious cases which make up 85% - 90% of all separations and divorces.(1) While the courts decide on maintenance obligations, quantum is decided by the chief administrative authority which can also review and vary these amounts.(2) Maintenance agreements which deal with both the obligation and amount of maintenance are subject to judicial review.(3) No legislation provides rules as to the mutual duty of support between common law spouses.

Both spouses are liable to support a child without distinction as to children born within or out of wedlock and adopted children. A limited obligation exists towards stepchildren. Neglect of the obligation results in an administrative order to pay.

Child maintenance is assessed on a needs and means basis.(4) If both parents are without means, the children receive a statutorily fixed 'standard maintenance' from the state (see 3.2 infra).(5) Standard maintenance payable by parents is established by statute.(6) These amounts are revised semi-annually and paid in advance at the rate valid at the time of payment.(7) Guidelines exist for calculating maintenance higher than the average.(8)

Maintenance normally terminates at 18 although it may continue to 24 for purposes of education or training.(9) It terminates on a daughter's marriage unless the chief administrative authority declares otherwise.(10) It also terminates where the child can provide his or her own support. This would occur where the chief administrative authority determines that the child's income exceeds these normal maintenance payments.(11)

Maintenance agreements are not binding on the chief administrative authority which has broad powers to vary.

The Ministry of Justice has central authority for the enforcement of maintenance obligations.(12) However, enforcement is taken through the municipal Social Welfare Board in the debtor's place of residence.(13) Where the applicant or local Board's information is insufficient to trace the debtor, the Investigation Service of the National Police Commissioner will be used.(14)

The debtor can be examined(15) and may enter into a payment proposal with the enforcement authority.(16) When a

payment agreement is broken or cannot be reached, the recovery authority may undertake garnishment proceedings, seek seizure of assets(17) and, as a last resort, seek default imprisonment.(18)

2.3.2 The Public Law System of Maintenance

Denmark supplies a child maintenance advance administered by the Ministry of Social Affairs/National Board of Social Welfare.

Eligibility requirements focus on Danish residency and citizenship.(19) Additionally, the parents must not be cohabiting.(20) The applicant must be paying the child's expenses i.e., the applicant must be the person entitled to receive maintenance on behalf of the child.(21)

The maximum amount of the maintenance advance is the amount set by statute as the quantum of the parents' private maintenance obligations.(22) Provisions for the children of impecunious parents appear to cover children who would receive less than the statutorily defined standard allowance. Special maintenance available at private law can be covered by maintenance advances.(23) Advance payments are indexed semi-annually.(24)

Maintenance advances are paid by the municipal Social Welfare Boards which are subrogated to the right to recover maintenance owed.(25)

Enforcement for maintenance advance payments is the responsibility of the municipality in which the debtor resides. It is often effected in co-operation with the fiscal administration or bad debt collection department within the municipal administration.(26) The public authorities have one principal advantage in garnishment proceedings: although second in priority to private claims, maintenance advance can be garnished for 20 years if the recovery is initiated and continued without interruption.(27)

2.3.3 Analysis of the Maintenance Advance: Cost-effectiveness, Problems and Benefits

In 1981, 164,969 children received 841.6 million kr. in maintenance advances (approximately $143 million in Canadian funds). More than every 8th child under 18 in Denmark received the maintenance advance.(28) No information is available as to recovery rates or administrative expenditure.

Insufficient information is available to make these assessments beyond the clear benefit that Danish children

receive a guaranteed minimum income through either statutorily defined standard allowances or maintenance advances.

2.4 ISRAEL

2.4.1 The Private Law Maintenance System

The Family Law (Maintenance) Amendment Act, 5719-1959 amended the Act on Family Law and established obligations of support, inter alia, for spouses and minor children. It is not known whether any laws regulate support between unmarried couples. Children over the age of majority may receive support under certain conditions; however, the legislation is unavailable to determine the extent of these obligations any further.(1) It is not known how maintenance obligations are calculated nor how they may be varied or terminated.

Maintenance may be raised by a court to reflect the cost-of-living under the Allocation of Interest Act, 5721-1961.(2)

Maintenance rights are established through agreement or a court order. An agreement authorized by the court has the same force and effect as a court order. Under the Execution Act, 5727-1967, the Chief Execution Officer is empowered to enforce maintenance where the debtor is subject to a court order to pay.(3)

2.4.2 The Public Law Maintenance System

Israel provides a maintenance advance to a judgment creditor with a maintenance judgment from either a civil or any competent religious court. The right to a state-funded maintenance advance derives from the Maintenance (Assurance of Payment) Law, 5732-1972. It is provided by the National Insurance Institute.

Apart from Israeli residency (4), the following conditions must be met:(5)

A woman must:

1) be over 60 or have the custody of at least one child with a judgment either in her favour alone or in favour of both the woman and child; or

2) have a court order for maintenance and no means of self-support where she does not have custody of a child.

A child will receive the advance if he/she has a judgment in his/her favour and is neither in the custody of his/her mother nor living with her, unless that child is principally supported by the government of a communal agency.(6)

The legislation determines the advance to be either the amount of the judgment or of the widows' and orphans' pension, whichever is the lower. This is a percentage calculation of the average wage: 25% for the mother, 37.5% for a mother with one child and 42.5% for a mother with two children. No additional benefit is conferred where there are three or more children since these children are covered by the child benefit or allowance. (The child allowance, at lower levels, is also available to first and second children.) The advance is indexed to the cost-of-living and tax-free.(7)

Payment is co-extensive with the debtor's duty i.e., as long as the court order is in force, or until a child turns 18, unless the adult child is unable to support himself.(8)

Funding is from the general revenues of the Treasury and funds are specifically appropriated to the program under s.16 of the Act. The expenditure represents less than 1% of social welfare expenditures.(9)

The Institute seeks recovery of the advance from the maintenance debtor who is expected to absorb some of the enforcement costs.(10)

The Execution Law, 5727-1967 subrogates the Institute in the creditor's rights.(11) The Institute may set off advance payments against monies it owes the debtor.(12) The advance legislation also provides for the transfer of excess maintenance collected to the creditor, minus collection costs(13) and, apportionment where both the creditor and the Institute have taken execution proceedings.(14)

2.4.3 Analysis of the Public Maintenance Advance

Little information is available to make any reasonable evaluation of the Israeli maintenance advance. In 1978, the first full year of operation, between 15% - 20% of social assistance recipients qualified for the program. Approximately 50% of program costs were recovered from the maintenance debtors.(15) So far, it appears that about one-third of the program costs have been collected.(16) The number of female-headed single-parent families in Israel is only 4% of all families with children.(17)

It appears that on January 1, 1982 a new income-support program was established to replace the previous social assistance program. The advance benefit appears to be administered as part of the new program.(18) Further information is needed to clarify the interaction of these programs, as the advance does not appear to have been fully absorbed into the new income-support program.(19)

Footnotes

1. Kreitler Kirkpatrick, Elizabeth, Alimony and Public Income Support: Fifteen Countries, 40 Social Security Bulletin, January, 1977, at p.38.

Sweden

2. Agell, Anders, Social Security and Family Law in Sweden. Reprinted from Social Security and Family Law, Alec Samuels, (ed.), (1979), Vol. 4, United Kingdom Comparative Law Series, at pp.157-158.

3. Marriage Code, c.11, s.14.

4. Agell, Anders, Paying of Maintenance in Sweden, International Invitational Conference on Matrimonial and Child Support, Conference Materials. (Edmonton: The Institute of Law Research and Reform, 1982), at p.9.

5. Loc. cit.

6. Kamerman, Sheila B. and Kahn, Alfred J., Child Support: Some International Developments, in Cassetty, Judith, (ed.), The Parental Child-Support Obligation. (Lexington: Mass.: D.C. Heath and Company, 1983), at p.233. For the full length version of this study, see Kahn, Alfred J. and Kamerman, Sheila B., Income Transfers for Families with Children, An Eight-Country Study. (Philadelphia: Temple University Press, 1983).

7. Code Relating to Parents, Guardians and Children, 1949, c.7, s.1.

8. Ibid., s.5.

9. Ibid., s.3.

10. Supra, footnote 4, at p.23, (footnote 7). Information provided to the Canadian Embassy in Sweden in May, 1984, indicated that the basic sum is arrived at by multiplying SKR 15,400 by 'a comparative figure reflecting the difference between prices in November of the preceding year and prices in June, 1980, but excluding consideration of energy prices, indirect taxes, etc.'

    It is difficult to show exactly what this means in terms of the cost-of-living. A contemporaneous bank publication gave the following 'sample budget' for a single-parent with two children:

Income	
Gross wages	54,000
Housing allowance	8,700
Child allowance and child support maintenance advance	12,900
Minus tax	12,800
Net income	68,000
Expenditures	
Food	18,000
Housing	16,500
Clothing	5,900
Misc. (transportation, union dues, etc.)	27,600
	68,000

Inflation would increase these amounts which appear to relate to 1983 data.

11. Supra, footnote 4, at pp.22-23.

12. Supra, footnote 7, s.3.

13. Supra, footnote 4, at pp.23-24.

14. Ibid., at p.24.

15. Loc. cit.

16. Supra, footnote 7, s.3.

17. Supra, footnote 4, at p.24.

18. Loc. cit.

19. Supra, footnote 7, s.7, para.1.

20. Act (No. 680) of 16 December 1966 Concerning Changes in Certain Maintenance Allowances (Index Act), s.3, and Commentary on the Index Act Swedish Ministry for Foreign Affairs, p.1.; supra, footnote 4, at pp.6-7; Advance on Support Payment and Support Payment, Swedish National Insurance Office, at p.10.

21. Supra, footnote 20, Commentary Index Act Swedish Ministry for Foreign Affairs, at pp.1-2. Also see Index Act, s.3.

22. Supra, footnote 7, s.10, para.1 and 2.

23. Ibid., ss.8 and 9.

24. Supra, footnote 4, at p.6.

25. Debt Recovery Code, Pt. 15, ss.7-9.

26. Debt Recovery Act, Pt. 15, s.3.

27. Act Relating to Advance Payments on Maintenance Allowances, 1964: 143, reprinted in the Swedish Code of Statutes 1976:277, s.1, para.1.

28. Ibid., s.2.

29. Supra, footnote 2, at p.185.

30. Ibid., at pp.172-173.

31. Supra, footnote 27, s.1, para.2 and 3.

32. Ibid., ss.4 and 4a. See also, Advance on Support Payment and Support Payment, Swedish National Insurance Office, at p.4.

33. Loc. cit.

34. Supra, footnote 27, s.16.

35. Ibid., s.17.

36. Supra, footnote 6, at p.233.

37. Nygren, Christina, Staten Far Betala, Stockholms Tianingen, 28 januari 1984 (newspaper article). The average annual value of the Swedish kronor in 1983 was $.1608 Canadian.

38. Supra, footnote 6, at p.233.

39. Annual figures for 1984 supplied to the Department of External Affairs indicate the general child allowance at SKR 3,300 per child with a bonus of 1,650 for three children, 4,950 for four children, 8,250 for 5 children and 11,550 for 6 children. Thus a family with 6 children would receive six times 3,300, plus 11,500 for a total of 31,350.

40. The national housing allowance in 1984 was SKR 3,180 per year, per child.

    The national-municipal allowance is available to families or individuals with or without children. For low-income earners, it covers 80% of housing costs over SKR 650 a month up to a limit which varies with the

number of children. In 1984, the rent limit for a single person was SKR 800 and for a family with 5 children, SKR 2,525 per month.

Eligibility for housing allowances is determined by a means test. The means test, in 1984, took the combined taxable income of the adults in the family from the previous year's tax returns, plus one-fifth of the value of the capital assets over SKR 75,000, plus one-half of any study grants, plus amounts deducted on tax returns for certain losses. The maximum means-tests incomes eligible to receive a full housing allowance in 1984 were: for a single person with no children, SKR 26,000; for a single person with children, 35,000; for a couple with children, SKR 43,000. The allowance is reduced by 15% of the portion of income exceeding the limit up to a maximum total income of SKR 60,000 and, by 22% of income over SKR 65,000. Thus, a couple with 2 children would receive no allowance if their means-tested income was SKR 120,000 or over.

The maximum combined allowance per year, in 1984, was: SKR 1,440 for a single person; SKR 12,540 for a couple with one child; SKR 15,720 with 2 children and SKR 33,900 with 5 children. It was proposed that these amounts be raised slightly for families with children in June, 1984.

41. Supra, footnote 6, Tables 15-1 and 15-2 at pp.235-236.

42. Ibid., Tables 15-3 and 15-4, at pp.237-238.

43. Ibid., at pp.234-238, particularly at p.238.

44. Supra, footnote 37.

45. Supra, footnote 6, at p.239.

Finland

1. Esko, Timo and Jantera, Maarit, Finlande, in L'obligation Alimentaire en Droit International Privé, vol. 1. (Paris, France: Editions du Centre National de la Recherche Scientifique, 1983), at pp.145-146. See also, Marriage Act, ss.51 and 79.

2. Aarnio, Aulis, 'Sufficient Maintenance' in the Finnish Law of Support, in The Child and the Courts, Ian F.G. Baxter and Mary A. Eberts (ed.). (Toronto: The Carswell Company Limited, 1978), at pp.177-178.

3. Child Maintenance Act, 1975, s.2.

4. Ibid., s.3, para.1 and 2.

5. Supra, footnote 1. Esko and Jantera, at p.145.

6. Act on the Cost-of-Living Indexing of Some Maintenance, 660/66. See also, Tennberg, Jan, Main Principles of the System of Child Maintenance Security, Administration of Social Welfare, Finland, at p.4.

7. Supra, footnote 6, Tennberg, at p.9.

8. Information provided to the Department of External Affairs by the Finnish Social Welfare Administration (May, 1984).

9. Act on Child Maintenance Security, 1977/122, s.1.

10. Ibid., s.2, para.4.

11. Ibid., s.6.

12. Ibid., s.7, para.1.

13. Ibid., s.7, para.2.

14. Ibid., s.8, and supra, footnote 6, Tennberg, at p.8.

15. Ibid., s.9.

16. Ibid., s.10.

17. Ibid., ss.1, 2 and 28.

18. Pajula, Jaako and Kalimo, Esko, Social Security in Finland, reprinted from 32 International Social Security Review, No. 2, 160. (Helsinki, Finland: Publications of the Social Insurance Institution, 1980), at pp.163-164.

19. Supra, footnote 9, s.11.

20. Ibid., s.13.

21. Ibid., s.19, para.1.

22. Ibid., s.19, para.2.

23. Ibid., s.20, para.1.

24. Ibid., s.20, para.2.

25. Ibid., s.29.

26. Ibid., s.21.

27. Supra, footnote 8. The annual average value of the 1983 Finnish mark was $.2216 Canadian.

28. Supra, footnote 18, at p.170.

Denmark

1. T. Svenné Schmidt, The Scandinavian Law of Procedure in Matrimonial Causes, in Eekelaar, John M. and Katz, Sanford N., (ed.), The Resolution of Family Conflict: Comparative Legal Perspectives. (Toronto: Butterworths, 1984), at p.95.

2. Act Relating to the Contraction and Dissolution of Marriage, 1969, Part 5, s.50(1) and s.53(2).

3. Ibid., ss.52 and 58.

4. Act on the Legal Status of Children, 1960/200, s.14(1).

5. Loc. cit.

6. Family Allowances and Other Family Benefits Act, ss.24 and 39.

7. Loc. cit.

8. Circular to Counties on Suggested Guidelines for the Determination of Child Maintenance Higher than the Standard, 1983, Ministry of Social Affairs, Directorate on Family Law, Denmark.

9. Supra, footnote 4, s.14(3).

10. Ibid., s.14(2).

11. Information supplied by the Danish Ministry of Social Affairs, October, 1984, at. p.5.

12. Maintenance Recovery Act, 1963, s.1.

13. Circular on Maintenance Recovery, Ministry of Justice, November, 1978, s.2.

14. Ibid., s.3(2).

15. Ibid., ss.6(1) and (4).

16. Ibid., s.8.

17. Ibid., s.11(1).

18. Ibid., s.20.

19. Supra, footnote 11. A copy of the legislation was unavailable. The principal features were outlined in information received from the Ministry of Social Affairs. Section 11(1) of the Family Allowances and Other Family Benefits Act.

20. Ibid., s.22(3).

21. Ibid., s.21(1) which incorporates s.18(2) of the Act on the Legal Status of Children.

22. Supra, footnote 11, at. p.3.

23. Supra, footnote 6, s.25(1) and (2).

24. Ibid., ss.24 and 39.

25. Ibid., s.28.

26. Supra, footnote 11, at p.10.

27. Supra, footnote 13, s.41(4).

28. Supra, footnote 11, at pp.2, 10 and 11. The annual average value of the Danish Kronor, in 1981, was $.1690 Canadian.

Israel

1. Shapira, Amos, Israel, in L'Obligation Alimentaire en Droit International Privé, vol. 1, Institut de Recherches Juridiques Comparatives. (Paris: Editions du Centre National de la Recherche Scientifique, 1983), at p.262.

2. Ibid., at p.264.

3. Ibid., at pp.263-264.

4. Maintenance (Assurance of Payment) Law, 5732-1972, s.2.

5. Supra, footnote 1, at pp.262-263.

6. Loc. cit.

7. Kamerman, Sheila B. and Kahn, Alfred J., Child Support: Some International Developments, in Cassetty, Judith, (ed.), The Parental Child-Support Obligation. (Lexington, Mass.: D.C. Heath and Company, 1983), at p.230.

8. Supra, footnote 4, s.1.

9. Supra, footnote 7, at p.230.

10. Supra, footnote 4, s.14(a).
11. Ibid., s.14(b).
12. Ibid., s.14(c).
13. Ibid., s.15.
14. Ibid., s.18(a).
15. Supra, footnote 7, at p.230.
16. Ibid., at p.231.
17. Loc. cit.
18. Ibid., at p.230.
19. Ibid., at 231.

Chapter 3 SWITZERLAND

The public maintenance advance system in Switzerland is examined separately in this chapter as it varies considerably in its principal features from the Scandinavian models. Switzerland's difficulties in establishing a PMAS are instructive as the federal-cantonal split jurisdiction raises constitutional issues similar to those which would arise in the Canadian context.

3.1 The Private Law Maintenance System

3.1.1 Introduction

Family law is in a state of change in Switzerland. Traditionally, the support for needy family members has come from the family. The primacy of private law support remains despite the 1976 filiation legislation which, inter alia, established a public maintenance advance.(1) A new bill to revise the general effects of marriage was passed by a vote of the people and the cantons in September, 1985. This law will not come into effect for two more years, to enable the cantons to make appropriate legislative changes.(2) The law governing divorce is to be revised at some future date.(3)

Swiss federal law does not address or regulate common law relationships. They are considered simple associations which the parties may regulate as they wish.(4)

Present legislation makes a husband responsible for family support and support can be ordered on separation.(5) On divorce, a wife has an action in damages (action en dommages-intérêts) for the loss of support, based on fault essentially; an action for a 'pension alimentaire' or 'pension d'assistance' which does not require fault; and, a further action 'en réparation du tort moral' which aims at compensating for the shock of divorce and facilitating integration into a new life.(6)

Articles 276-295 of the Swiss Civil Code establish the principal child support obligations.(7) The obligation rests on both parents but, on family breakdown, the non-custodial parent usually makes the greatest financial contribution. He may be ordered to make all of that contribution if well-off, relieving the custodial parent of financial obligations.(8) The support obligation is independent of factors such as the debtor's illness, imprisonment or lack of financial resources although able to work. What the debtor could earn if willing to apply himself is what appears to be important.(9)

Maintenance is determined on the basis of need and ability to pay, with the child's resources being taken into consideration.(10) This obligation has priority over other

debts but is on the same footing with obligations to children of previous or later marriages.(11)

Child maintenance terminates on the child reaching the age of majority or on death, unless otherwise agreed or ordered.(12)

Generally, maintenance is enforced by ordinary court action for debt.(13) In bankruptcy, family obligations have priority in the first class of unsecured debts.(14)

In the 1976 filiation revision, art. 290 was added to the Civil Code. This article obliged the regional governments or 'cantons' to provide the custodial parent with free, adequate assistance for the execution of support payments. The assistance is not entirely free. The canton pays the enforcement service costs but not the costs of suing the debtor nor of legal fees incurred when the debtor's domicile is outside Switzerland.(15)

The debtor can also be subject ultimately to a criminal action.(16) He/she may also be ordered to provide security where he/she appears to be preparing to abscond or squander assets.(17) There is a five year limitation period on maintenance allowances.(18)

3.2 The Public Law Maintenance System

The public law intervenes in family support only after extensive family liability has been exhausted.(19) The cantons provide a public maintenance advance to the children of divorced or unmarried parents under a wide range of conditions and, exceptionally, to spouses whose support payments are in default.

3.2.1 Legal Basis for the Public Maintenance Advance

As early as 1965, it was noted that funds for needy children were being drawn from communal and cantonal operating funds.(20) The Scandinavian advance systems, notably Denmark's, influenced the development of the Swiss maintenance advance.(21) However, cantonal autonomy and the constitutional division of powers prevented the establishment of a truly national advance system. Art.293(2), establishing the maintenance advance, was founded on the reserve in art.6 CC which does not affect the division of powers between the Confederation and the cantons.(22) The advance was legislated under art. 293(2) of the Civil Code in rather vague terms. This article states that the cantons are to regulate the payment of a child support advance where parents fail to fulfill their obligations. All conditions and rights relating to the advance are within the legislative authority of the cantons. Thus, eligibility, administration

and funding vary widely. (Note that cantonal enforcement services were legislated under this same law, supra.)

3.2.2 Eligibility for Public Maintenance Advance

The three requirements(23) for eligibility common to all cantons are: 1) establishment of the debtor's obligation; 2) the creditor must have a legal right to support either by judgment or agreement; and, 3) the debtor is in default.

The default requirement has given rise to some public confusion with respect to the difference between having a creditor's right to a maintenance advance and simply being in a state of need requiring social assistance.(24)

Although clearly intended for children, some cantons have also provided an advance to separated or divorced spouses.(25)

Finally, while the Germanic cantons have no minimal residency requirement; all of the Romanic cantons do.(26)

3.2.3 Determination of the Quantum of the Advance and Indexing

The amount of the advance varies widely from one canton to another. There is no uniform policy on whether the child's assets and revenues should be taken into account. Theoretically, if the right flows from a pre-established legal obligation, these considerations should be ignored. This view was accepted in Geneva, but economic restrictions in other cantons have forced them to exclude some children on these grounds.(27) The Romanic cantons' criteria vary widely. The Germanic cantons have standardized payments by adopting as a ceiling the maximum state allowance payment available to orphans.(28) This is indexed to the cost-of-living.(29)

Although an authorized agreement or judgment is a condition of eligibility, the amount awarded by the court is often ignored. The administrative advance is generally lower than the maintenance award.(30)

3.2.4 Duration of the Maintenance Advance

In some cantons, the duration of the advance is inextricably tied to the success of the public authority's enforcement procedures.

The Germanic cantons pay an advance until there is a change in the child's circumstances, such as the debtor resuming payments.

The child in the Romanic cantons is in a more tenuous position. In Geneva, the advance is withdrawn where enforcement is fruitless. Neuchâtel will not provide the advance if enforcement is unsuccessful or if the debtor is found to be insolvent after the payment of four advance instalments. Valais terminates the advance if advance payments are not recuperated within one year.(31) Vaud and Fribourg, however, will provide the advance where there is no hope of recovery.(32)

3.2.5 Administration of the Maintenance Advance

Funding was never intended to come from existing social assistance programs.(33) As noted above, there is a tendency for funding to be tied to the success of enforcement. It is difficult to reconcile the notion of protection of children from economic hardship with the competing principle that the maintenance advance is not to become another form of social assistance.

Part of the confusion between the maintenance advance and other forms of social assistance arises from the administration of the advance.

The Germanic cantons provide the advance through a system of private services which are generally organized by women's associations and have been in existence in various centres for some time.(34) The Romanic cantons opted for public administration. In some cantons, the administration was attached to an existing social service. Only two cantons created an independent office within the cantonal administration.(35)

The Romanic cantons have used a variety of formulae to resolve disbursement costs between cantons and local governments.(36)

The Romanic cantons have tended to centralize the advance and enforcement administration at the cantonal level, whereas the Germanic cantons have adopted a decentralized approach.(37) It has been argued that a centralized, independent administrative agency allows children who receive the maintenance advance to remain anonymous, further differentiating receipt of the maintenance advance from the negative associations of public assistance.(38) A similar argument has been made for joining the advance administration to the agency responsible for enforcement. This argument has apparently not been accepted in the Germanic cantons.(39)

3.2.6 Public Enforcement and the Public Maintenance Advance

The recuperation of the maintenance advance from maintenance debtors has led to some legal difficulties based on

the enforcement agency's legal standing in court. A resolution of this problem has been legislatively adopted in canton of Jura.(40)

3.3 Analysis of the Public Maintenance Advance

Figures were not available to evaluate the cost-effectiveness of the Swiss public maintenance advance. The variability in eligibility, administration and funding across the country would make meaningful comparisons very difficult.

Footnotes

1. Lenoir-Degoumois, Dr. Valy and Jaccottet, Catherine, La notion d'avance selon l'art.293 al.2 CC5, (1980) Revue de droit suisse, Tome I, 453, at p.453.

2. Results of the September 22, 1985 vote provided by the Department of External Affairs.

3. Information provided to the Department of External Affairs by the Office fédéral de la justice, July, 1985.

4. Memorandum, Office fédéral de la justice Suisse, April 19, 1984.

5. Code civil suisse, art.176.

6. Ibid., art.151(1), (2) and art.152. See also Deschenaux, Henri et Tercier, Pierre, Le Mariage et le Divorce, la formation et dissolution du lien conjugal. (Berne: Editions Staempfli & Cie, deuxième édition) at pp.114 ff.

7. See also, art.169-172, 145(2) and 158(5).

8. Des Gouttes, René, Divorce (Droit des parents: art.156 CC) IV Contribution aux frais d'entretien et d'éducation, FJS 530, ler décembre 1980, at p.2.

9. Ibid., at pp.2-3.

10. Supra, footnote 5, art.285(1).

11. Supra, footnote 8, at p.4.

12. Ibid., at p.6.

13. Supra, footnote 4.

14. Art.219 L.P. (Loi sur la poursuite et la faillite).

15. Degoumois, Dr. Valy en collaboration avec Jacottet, Catherine et Kaufmann, Gusti, Pensions alimentaires, aide au recouvrement et avances. (Genève, Suisse: Editions Médecine & Hygiène, 1982), at p.31.

16. Art.217 C.P. (Code pénal).

17. Supra, footnote 5, art.291.

18. Art.128 C.O. (Code des obligations).

19. Supra, footnote 5, art.328 and art.293(1), (2).

20. Supra, footnote 15, at pp.19-21.

21. Ibid., at p.27.

22. Ibid., at pp.32-34.

23. For a jurisdiction by jurisdiction examination of eligibility requirements, see Dr. Valy Degoumois' text referred to, supra, at footnote 15.

24. Ibid., at. pp.37-39.

25. Ibid., at p.139. See, for example, art.42, c.8 LPAS (Canton of Vaud).

26. Ibid., at pp.172-173.

27. Ibid., at p.155.

28. Ibid., at p.173.

29. Ibid., at p.167.

30. Ibid., at p.166.

31. Ibid., at p.173.

32. Ibid., at p.159.

33. Supra, footnote 1, at p.455 quoting the message from the Conseil fédéral of June 5, 1974.

34. Supra, footnote 15, at p.165.

35. Loc. cit.

36. Ibid., at p.169.

37. Loc. cit.

38. Loc. cit.

39. Ibid., at p.170.

40. Ibid., at pp.174-176.

Chapter 4 NEW ZEALAND

4.1 The Private Law Maintenance System

4.1.1 Maintenance Obligations

The Family Proceedings Act, 1980 requires spouses to maintain each other during marriage to the extent necessary to meet reasonable needs, but only where the other spouse cannot meet his/her own needs due to a specified list of circumstances including physical or mental disability and inability to find adequate employment.(1) On marriage dissolution, the maintenance obligation is virtually the same. Each party is expected to assume responsibility for his/her needs within a reasonable period of time and neither is to be responsible for the other when that time expires. This may be qualified by considerations of age or duration of the marriage.(2)

Spousal maintenance is assessed without regard to the standard of living of the common household.(3) Neither the maintenance debtor nor any dependent is to be deprived of a reasonable standard of living.(4) The assessment generally is of need and ability to pay.(5) Conduct may be considered if it is used as a device to prolong economic dependence or if it would be repugnant to justice.(6) Spousal maintenance terminates on the remarriage of the spouse receiving support.(7)

Each parent is liable to support his children to the age of 16, and to the age of 18 or 20 in special circumstances.(8) The assessment is based on the child's reasonable needs and the parents' means.(9) The fact that either parent is supporting any other person is one of the factors considered.(10)

The Act provides, inter alia, that a court may request any officer of the Department of Social Welfare to submit a written report outlining the earning capacity and economic circumstances of a party to the proceedings. Each party or their counsel receives a copy. Evidence may be tendered on any point raised and the officer must appear as a witness in respect to matters arising out of the report.(11)

4.1.2 Enforcement of Private Law Maintenance Obligations

Unpaid maintenance is a debt which can be collected in any district or family court.(12) Maintenance creditors may apply for enforcement to the maintenance officers within the Department of Social Welfare (DSW) who administer a computerized enforcement system.(13) These officers enforce orders or agreements not suspended by the liable parent contribution scheme (see 4.2, infra) or discharged.

An applicant can opt out of the enforcement process by a request in writing.(14) However, the recipient of a domestic purposes benefit cannot do so.(15)

The court and administrative procedures are well integrated. Copies of court orders and registered agreements are sent to the DSW nearest the court. Almost invariably, the court orders payment to the DSW. A district file and master computer record are established which monitor the debtor's payments.(16)

When enforcement is necessary, the creditor is contacted for tracing and financial information relating to the debtor. However, enforcement officers also have access to several government data banks, including the DSW Data Processing Centre, the Land Registry Office records, the Companies Register and the Motor Vehicle Register.(17)

Deduction notices may be consented to voluntarily as a convenient form of payment(18) or ordered by the maintenance enforcement officers for arrears.(19) Payments are monitored regularly.(20)

Where the defaulting debtor is self-employed or unemployed, the Family Proceedings Act, 1980 provides that the following orders may be made: warrant of distress,(21) attachment orders,(22) charging orders(23) and receiving orders.(24) Default(25) and contempt(26) proceedings are also available.

4.2 The Public Law Maintenance System

4.2.1 The Liable Parent Contribution Scheme

New Zealand has sought to integrate the private and public law maintenance systems with the establishment of the liable parent contribution scheme. This came about on the passing of The Social Security Amendment Act 1980 which came into force on April 1, 1981.(27) The Act introduced a new scheme 'to replace court-ordered maintenance with an administrative procedure administered by the Social Security Commission when a state social security benefit is being received.'(28) This benefit is known as a domestic purposes benefit.

Previous legislation did not allow the Social Security Commission to recover the funds it was paying out in domestic purposes benefits. The Commission could only seek enforcement where there was an established obligation. They therefore obliged domestic purposes recipients to seek court orders for maintenance but there were excessive delays of 12 to 18 months(29) and the recovery rate was only about 10%.(30)

In assessing the domestic purposes benefit pay out, it is to be borne in mind that eligibility (see, infra) is not affected by either willingness or ability to be self-supporting. A single unemployed person with a dependent child automatically goes on this benefit rather than on unemployment. It is theorized that at least 25% and possibly more of all domestic purposes beneficiaries fall into this hidden unemployment category although accurate data are unavailable to confirm this.(31)

The government attempted to improve things with two pilot schemes.(32) Firstly, domestic purposes applicants were immediately sent for counselling. The hope was that if rehabilitation of the relationship was impossible, at least maintenance arrangements satisfactory to the Commission might be worked out. The success rate was found to be higher than that for conciliation during separation proceedings.

Secondly, DSW lawyers were used to seek maintenance orders. This met with tremendous opposition from the legal community. The success rate was not high and another solution was sought taking into consideration the findings and recommendations of the Finer Report (see, supra, Part I).

4.2.2 Eligibility for the Domestic Purposes Benefit

The domestic purposes benefit is available to single parents aged 16 or over with dependent children. The non-custodial or 'liable parent' must be 'identified in law'.(33) The benefit is also available to a 'woman alone'. A 'woman alone' is one who either has never been married or who has lost the support of her husband and has cared for either dependent children or an incapacitated relative for a specified period of time. The care of these dependents must have ceased after the woman has attained the age of 50.(34)

The custodial parent no longer has to seek a court order for maintenance. Instead the new 'identification in law' is required, usually through a presumption of parenthood or a paternity determination.(35) This usually takes place before application for the benefit; therefore, the benefit is received more quickly because the necessity for court proceedings to obtain a maintenance order has been eliminated. The identification condition cannot be waived as the obtaining of a court order could be under the previous legislation with the resulting anomaly that failure to establish paternity means ineligibility for the benefit.(36) Inability or unwillingness to identify the non-custodial parent has the same result. These applicants receive an Emergency Maintenance Allowance at a lower rate than the domestic purposes benefit for the first 26 weeks.(37)

A domestic purposes recipient can apply for a support order. The maintenance 'shall be determined' without regard

to the respondent's contribution to the liable parent contribution scheme.(38) Receipt of the benefit does not extinguish the private law liability.(39) However, a maintenance order or agreement is suspended during the time the benefit is being received, even if higher than the amount of the benefit.(40) An order would be sought, for example, where the possibility of employment and relinquishing the benefit might be foreseen by the custodial parent.(41)

The scheme is limited to the support of children because of problems with the concept of virtually automatic spousal support being assessed administratively.(42)

4.2.3 Determination of the Quantum Contribution of the Liable Parent

Once eligibility is satisfied, the Commission notifies the liable parent that he/she must contribute and must supply all financial and other information to determine his/her contribution.(43) If the liable parent does not co-operate or is missing, the Commission makes its best determination of his/her likely gross earnings for the current year and this is deemed correct unless proven otherwise.(44)

The liable parent pays the lowest amount calculated on the basis of four formulae contained in the Act.

The 'flat rate approach' posits an amount of $20 per week per child plus an additional $20 (not per child) for any child under the age of 5. It is usually applied to a liable parent living alone who has to support a small number of children.

The second amount is equivalent to the current weekly benefit payable to the beneficiary. This amount is rarely used as very few liable parents can afford to pay this much.

The third, most complicated formula, the 'deductions approach' is based on annual gross earnings from which specified deductions are made including amounts for sequential families. This is the most likely formula to be used for liable parents with responsibilities for a new family.

The final formula is the 'one-third approach' which sets the contribution at one-third of the liable parent's weekly income after the deduction of income tax.

An amendment to the legislation has imposed a $15 minimum weekly contribution (see minimum payment rule, section 4.2.7 infra), even where the formulae applied would result in a lower contribution.

4.2.4 Administrative Procedure for the Liable Parent Contribution Scheme(46)

The liable parent receives a 'Liable Parent Contribution Pack' by registered mail which provides all the relevant information, including rights established by legislation, and objection and self-assessment(47) forms which must be completed and returned within five weeks. Similar information is sought from the employer as verification.(48) Only about 30% of the forms are returned on time, so the DSW makes a default assessment(49) in roughly 70% of the cases. Unavailable earnings information is replaced by Department of Labour average weekly wage calculations for all occupations.(50) The average voluntary assessment is approximately $30.83 per week (approximately $25.28 Canadian), whereas default assessment average about $60 per week (approximately $49.20 Canadian), making it in the liable parent's interest to cooperate.(51)

On assessment, another package with a 'Ways to Pay' booklet is sent out by registered mail.(52)

The same time limits apply to default assessments.(53) Inquiry forms for tracing are sent to the domestic purposes beneficiary and DSW head office every 3 months. They may also be sent to friends, relatives, employers, banks and insurance companies. Approximately 47% of liable parents have not contributed to the scheme: the majority of these cannot be traced.(54)

The liable parent can elect payment by deduction notice, direct bank transfer or by a personalized deposit book allowing him to make deposits at any bank. A deposit book is automatically issued where the liable parent does not make an election.(55)

A liable parent may object to the Commission, at any time, in writing, on the basis of grounds provided in the Act.(56)

Even a liable parent receiving social security or a national pension is assessed for contribution and deductions are made at the source. However, the Commission has the discretion to relieve against contributions where it would result in serious hardship to the liable parent or to his dependents in the event of the liable parent's death.(57)

Secondly, the Act obliges a review of every contribution from time to time.(58)

The liable parent may apply for a review at any time if there are either changed circumstances or new evidence not considered in making the original contribution.(59)

4.2.5 Enforcement of the Liable Parent Contribution Scheme Obligations

Unpaid contributions are a debt due to the Crown and recoverable by civil proceedings.(60) The Commission has the discretion to make deductions from social security benefits or to issue deduction notices(61) (see 4.1, supra) which are the primary and preferred method of recovery.(62)

4.2.6 Termination of the Liable Parent's Contribution Obligation

The contribution obligation is co-extensive with payment of the domestic purposes benefit.(63) Outstanding balances can be recovered after termination of the benefit, although care is exercised about how this is done, in some situations.(64)

4.2.7 Amendments to the Liable Parent Contribution Scheme

In 1982, the minimum payment rule was introduced requiring every liable parent to contribute $10 weekly (now $15) if the assessment under the Act was less than that amount.(65) This can be relieved against under the s.27ZG 'serious hardship' provision. The rule is binding on the Commission but does not bind the courts.(66) The rule was introduced to combat rising program costs and low enforcement success.(67)

The second 1982 amendment removed from the courts' consideration any matter relating to an objector's ability to pay,(68) making serious hardship the only relief in this regard and available only from the Commission.(69) This has been criticized as undermining the uniformity between the scheme and the maintenance laws, limiting judicial discretion and splitting the appeal process.(70)

4.3 Analysis of the Liable Parent Contribution Scheme: Cost-effectiveness, Problems and Benefits

(a) Cost-effectiveness

Collection rates show that the amounts received as a percentage of nominal value were 36.1% in 1982, 44.3% in 1983 and 48% in 1984.(71)

On the expenditure side, $330 million was paid out in 1982 in domestic purposes benefits (approximately $306.9 million Canadian), out of a total welfare expenditure of $3,900 million (approximately $3.6 billion Canadian). Collections offset between 6-7% of the expenditure.(72)

Figures for June, 1983 showed 47.8% (or 17,792 out of 33,285) of liable parents had never made any

contribution.(73) Only 4,772 liable parents were assessed at the full rate, while approximately 25% of all liable parents were themselves receiving a social security benefit.(74) It was found that 26.4% of assessments under the Act were for $10 or less.(75) The average value of current assessments in June, 1983 was $30.83 (approximately $25.28 Canadian), while average periodic maintenance orders were $18.54 weekly (approximately $15.20 Canadian). The average when lump sum arrears were added in was $35.90 (approximately $29.43 Canadian). The figures include spousal and child maintenance.(76)

Approximately 250 people work in the administration of the scheme with a ratio of one staff member to every 300 maintenance or liable parent cases.(77) Direct annual salary costs for officers in the District Offices working with the LPC Scheme, in 1983, were $1.47 million (approximately $1.2 million Canadian). Administrative costs are matched by contributions received over a 4.4 week period. Direct annual salary costs for maintenance are matched by contributions received over a 5.8 week period.(78)

Whether there has been a major savings to legal aid has not been settled; however, it appears that the scheme has had a significant impact. The 1981-82 report of the New Zealand Legal Aid Board showed a dramatic drop in activity for a first time since its inception. The report cited the liable parent contribution scheme as the major influencing factor in this reduction.(79)

(b) Problems with the Liable Parent Contribution Scheme

Most problems centre around the failure to achieve a high collection rate.(80) It was originally thought that 70% was a realizable goal.(81) A wide variation in collection rates was found across the country. Low collection rates in some areas are thought to be due to a concentration of people from poorer socio-economic groups or mixed ethnic backgrounds which makes tracing more difficult. Factors cited as significant in high collection areas were frequent review of cases followed quickly by necessary enforcement action and the local tracing success.(82) These findings correspond to those found in Chambers' Michigan study, discussed in chapter 5, infra).

The investigations of the Australian National Maintenance Inquiry revealed the following specific problems and outlined how they are being dealt with by the government.(83)

i) Lack of success in the use of civil proceedings as an enforcement remedy

The automatic wage deductions have been found to be not only effective in practice, but also, not to be significantly objected to by liable parents. However, the use of civil proceedings appears to be merely an ineffective threatening device. Consequently, defaulting self-employed liable parents are difficult to enforce against as they are not subject to the deduction notices.

ii) Tracing problems

The experience of the DSW has been that the greatest chance of success in tracing the non-custodial liable parent exists where contact is made as quickly as possible after a domestic purposes benefit is granted. It would appear that more aggressive tracing procedures may be necessary in cases where the liable parent's address or employment information is missing.

In an attempt to improve collections, a recent staff reorganization resulted in the creation of Revenue Divisions. It is hoped that this initiative will improve collections.

iii) Relationship between the liable parent and the Department of Social Welfare

There is a suspicion that the fairly high level of antagonistic feeling expressed by some liable parents towards the DSW officers may, at least partly, result from the liable parent feeling that he is being opposed by the full force of the state. It is believed that this feeling may spring from the fact that a liable parent objecting to an assessment on any ground other than that he is not liable in law to maintain the child must carry the burden of proof.

iv) Inequities in the assessment of contributions

The use of administrative formulae to calculate contributions has inherent advantages and disadvantages. The use of formulae allows for quick and relatively simple calculations but is offset by a certain lack of flexibility. This inflexibility seems to show up at the extreme ends of the scale.

Where low income earners would formerly not be required to contribute, they are now being caught by the minimum payment rule (see supra, section 4.2.7). At the other extreme, there seems to be some evidence to indicate that high wage earners will deliberately default on their private law obligations to force their dependents onto the domestic purposes benefit which results in a lower financial liability

for the supporting parent. The figures cited in relation to average LPC scheme contributions as compared with average periodic maintenance orders would not initially seem to bear this out. However, there is sufficient concern that a review of high income earners is being undertaken.

There would also appear to be some question as to whether or not the needs imposed by second families are being sufficiently taken into consideration. The DSW feels it does provide adequate protection through the hardship provisions but, the fact that the question has been raised would seem to indicate that these provisions may not be adequate.

v) The Integration of Private and Public Law Obligations

There has not been a completely harmonious integration of private and public law obligations. Problems have arisen from the fact that the public law intervened as of the coming into force of the LPC scheme to determine the liability for and the amount of non-custodial parents' contribution, whereas the private law determinations made prior to that date continue unchanged. One would expect this problem to gradually disappear but it will take many years to do so.

The institution of the liable parent contribution scheme means that part of the adversarial nature of marriage breakdown has been transferred to the state. Atkin has expressed concern that the economic aspect has been removed from the regulation of related issues such as custody, leaving less scope for negotiating 'package deals' to resolve all the issues on marriage breakdown.(83)

There is an opposing argument however, that maintenance should never be part of a negotiable package because a right to maintenance based on real need should not be waived or modified by other considerations.

Atkin also points out that whereas the private law resolution of family conflict emphasizes counselling, mediation and negotiation, the liable parent contribution scheme legislation makes no parallel provisions.(84) Information as to the availability of counselling may be conveyed informally, but Atkin has proposed modifying the legislation so that the liable parents' liability would be suspended as long as the parties were undergoing approved marriage counselling. This would have very real advantages for both the parties involved and the state.

Atkin also foresees more clearly the end of spousal maintenance as most maintenance cases in the recent past were related to the receipt of a domestic purposes benefit. Atkin sees this as being in line with the philosophy embodied in the Family Proceedings Act 1980 of spousal support

being transitional in nature. He believes that spousal maintenance provisions will fall into disuse and may be legislated out of existence by the next decade.(85)

In commenting on the state's role in financial support on family breakdown, Atkin states that:

> '... Some in the community regret this role and regard family maintenance as still being first and foremost the responsibility of the husband. The state's role has become inevitable however and short of major social revolution, nothing will alter this. The liable parent contribution scheme, if anything, entrenches the state's position but paradoxically the new machinery may well also make it more likely that the husband's perceived responsibilities will be met. Increasingly the causes of marriage breakdown are being seen as social and economic rather than as personal moral failure. If this is so, it might be more proper to regard the liable parent as subsidizing society at large rather than vice versa.(86)

vi) Complexity of Forms

The complaints about the complexity of the forms the liable parent is required to complete have been an important factor in their low return rate. Complaints appear to be justified in that the forms were originally designed for a more complex computer system than that which is actually in place. The forms are being redesigned.

vii) Displacement of Court-ordered Maintenance by Administrative Procedures

The displacement of court-ordered maintenance by administrative procedures is not without controversy. Atkin points out that the liable parent contribution scheme cannot be considered constitutionally valid unless the determination of the quantum of the liable parent's contribution is viewed as an administrative as opposed to a judicial task. This is a highly debatable issue.(87) Access to the courts is available at the end of the appeal procedures but not for the review of all issues (see the discussion re: the amendment of s.27P(b)(iv), supra).

However, it has also been asserted(88) that the concept of this administrative scheme can be accurately likened or analogized to the taxation model. The state fixes taxation levels in a similar way to the determination of LPC scheme contributions. The relationship between the liable parent and the state can in this way be defined as that between a citizen and the state as a collector of revenue.

viii) Level of Compensation to be Provided by Domestic Purposes Benefits

One of the principal reasons that the Australian National Maintenance Inquiry gave for rejecting the idea of the adoption of a scheme similar to the liable parent contribution scheme for Australia was that it felt the beneficiaries of the equivalent to the New Zealand domestic purposes benefits would have to be compensated at higher levels in return for the removal of their right to maintenance income.(89) It would otherwise be unfair to reimburse state funds expended from maintenance funds recuperated. While this does not appear to be a problem in New Zealand, this concern does however serve as a reminder that ideas cannot always be easily transplanted from one jurisdiction to another even where the general features of the systems which are in place may be quite similar.

(c) Benefits of the Liable Parent Contribution Scheme

The principal benefits from the scheme thus far appear to be:(90)

- reduced workloads in Family Courts due to a reduced number of applications for maintenance;
- a reduced demand on legal aid services;
- initially, a reduced number of domestic purposes benefits have been granted (the early requirement to establish parent liability has eliminated some spurious applications);
- court delays are eliminated;
- liability is established much earlier;
- the removal of maintenance from the negotiations between the parties and the courts, may enable other related issues to be dealt with more quickly.

It has been argued that one of the chief benefits is the clear acknowledgement of the role of the public law in family breakdown.(91)

Footnotes

1. Family Proceedings Act 1980, N.Z.S. 1980, No.94, as amended, s.63.
2. Ibid., s.64.
3. Ibid., s.65(2).
4. Ibid., s.65(3).
5. Ibid., s.65(1).
6. Ibid., s.66(2) and (6).
7. Ibid., s.69.
8. Ibid., s.72(1).
9. Ibid., s.72(2).
10. Ibid., s.72(3).
11. Ibid., s.91.
12. Ibid., s.10.1.
13. Ibid., s.7.
14. Ibid., s.7(2).
15. Social Security Act 1964, N.Z.S. 1964, No.136, as amended, s.27F(3).
16. A Maintenance Agency for Australia, The Report of the National Maintenance Inquiry, Attorney-General's Department. (Canberra: Australian Government Publishing Service, 1984), at pp.137-139.
17. Loc. cit.
18. Supra, footnote 1, s.104.
19. Ibid., s.110.
20. Supra, footnote 16, loc.cit.
21. Supra, footnote 1, s.103.
22. Ibid., s.105.
23. Ibid., s.118.
24. Ibid., s.121.

25. Ibid., s.124.

26. Ibid., s.130.

27. Social Security Amendment Act 1980, N.Z.S. 1980, No.157, ss.27I-ZI.

28. Atkin, W.R., Liable Parents: The New State Role in Ordering Maintenance (1981), 5 Otago Law Review, 48, at p.48.

29. Supra, footnote 76, at p.113.

30. Supra, footnote 28, at pp.49-50.

31. Supra, footnote 16, at p.112.

32. Supra, footnote 28, at p.50.

33. Supra, footnote 27, s.27B.

34. Ibid., s.27C.

35. Ibid., s.27I(2) and the Status of Children Act 1969, s.5.

36. Supra, footnote 28, at p.57.

37. Supra, footnote 16, at p.115.

38. Supra, footnote 27, s.27J(5).

39. Supra, footnote 1, s.62; supra, footnote 38, loc. cit., and supra, footnote 28, at p.57.

40. Social Security Amendment Act (No. 2) 1982, N.Z.S. 1982, No.154, s.3.

41. Supra, footnote 28, at p.57.

42. Supra, footnote 16, at p.112.

43. Supra, footnote 27, s.27L(3).

44. Ibid., s.27M(5).

45. Supra, footnote 16, at p.116.

46. As summarized, supra, footnote 16, at pp.117-118.

47. Supra, footnote 27, s.27L requires the liable parent to notify the Commission of his/her gross earnings for the last completed income year.

48. Ibid., s.27M.

49. Ibid., s.27M(5).

50. Supra, footnote 16, at p.117.

51. Ibid., at pp.116-117.

52. This information is required to be given under s.27N, supra, footnote 27.

53. Ibid., s.27K(2).

54. Supra, footnote 16, at p.118.

55. Loc. cit.

56. Supra, footnote 27, s.27P.

57. Ibid., s.27ZG.

58. Ibid., s.27ZH.

59. Ibid., s.27ZH(2).

60. Ibid., s.27X.

61. Ibid., ss.27X(2) and 27Y.

62. Supra, footnote 16, at p.123.

63. Supra, footnote 27, s.27K(3).

64. Supra, footnote 16, at p.124.

65. Social Security Amendment Act (No. 1) 1982, N.Z.S. 1982, No.16, s.5(4).

66. Atkin, W.R., Making Liable Parents Pay More, 1983 New Zealand Law Journal 75, at p.75.

67. Loc. cit.

68. Social Security Amendment Act (No. 2) 1982, N.Z.S. 1982, No.154, s.5.

69. Supra, footnote 27, s.27ZG.

70. Supra, footnote 66, at p.77.

71. Excerpt from letter from Mr. Venn Young, Minister of Social Welfare to the Canadian High Commissioner in New Zealand, H.E. Mr. C.O. Rousseau, dated June 21, 1984.

72. Supra, footnote 16, at p.129. The Inquiry warned that caution should be used in interpreting this data as unpaid amounts for past arrears did not appear to be included. Some funds collected might actually be payments to reduce outstanding arrears. The annual average value of the New Zealand dollar was $.9275 Canadian in 1982.

73. Loc. cit.

74. Loc. cit.

75. Loc. cit.

76. Loc. cit. The annual average value of the New Zealand dollar was $.8239 Canadian in 1983.

77. Ibid., at p.130.

78. Loc. cit.

79. Loc. cit.

80. Loc. cit.

81. Loc. cit.

82. Ibid., as summarized from pp.131-134.

83. Supra, footnote 28, at p.62.

84. Loc. cit.

85. Loc. cit.

86. Ibid., at p.63.

87. Loc. cit.

88. Supra, footnote 16, at pp.112-113. (See also Thomas, G.J., New Zealand's Nonjudicial Parental Income Attachment Scheme in Eekelaar, John M. and Katz, Sanford N., The Resolution of Family Conflict, Comparative Legal Perspectives. (Toronto: Butterworths, 1984), at p.541).

89. Ibid., at p.135.

90. Ibid., at pp.134-135.

91. Loc. cit.

Chapter 5 STATE INITIATIVES IN CHILD SUPPORT AND ENFORCEMENT IN NORTH AMERICA

5.1 Aid to Families with Dependent Children (AFDC) and the Child Support Enforcement Program

Introduction

The jurisdiction over substantive family law matters such as marriage, divorce, custody and property division lies with the states. There is a mixed federal-state jurisdiction over the recognition and effect of maintenance and custody orders. Where parties reside in different states and more than $10,000 is at issue, a federal court can take jurisdiction.(1)

The family welfare system is a co-operative one in which the states administer programs required to meet minimum federal requirements on a cost-sharing basis. The result can mean a wide variation in welfare benefits across the country because of differences in eligibility and payment amounts.(2) This is similar to the Canadian welfare system which is administered through provincial and municipal legislation although the federal government contributes up to 50% of total expenses under the Canada Assistance Plan (CAP). Through regulations in the negotiated agreement with the provinces, the federal government has some control over how welfare funds are spent. However, a recent study shows huge differences in welfare payments across the country.(3)

5.1.1 Aid to Families with Dependent Children (AFDC) and the Child Support Enforcement Program: Background

The major financial assistance program to single parent families in the U.S. is the AFDC program. Title IV-A of the Social Security Act authorizes grants to states for aid and services to needy families with children. To be eligible for AFDC, a family must meet financial criteria and, one parent must be dead, incapacitated or absent from the home. 'Absent from the home' means divorced, separated, deserted or never married. Almost 90% of the AFDC caseload deals with absent parent families. Of that number, almost half involve a father never married to the mother.(4)

To reduce AFDC dependency, recent policy objectives have focussed on increasing the employment of custodial parents. However, this approach has raised questions as to the appropriateness of placing the financial burden of dependent children on that parent. Related concerns for the well-being of these mothers and their children in relation to the availability, cost and quality of child care and the provision of adequate work incentives have in part, prompted an alternative approach of seeking greater child support from absent parents.(5)

One 1972 study showed that many absent parents who were financially able to support their children did not do so because of the low priority enforcement was given by both the states and the federal government.(6)

In January, 1975, Title IV-D, the Child Support Enforcement Program, was added to the Social Security Act.(7) In 1981, the legislation, which originally was limited to child support, was amended extending support obligations to include spousal support.(8) In August, 1984, extensive amendments came into force to deal with some serious deficiencies in the program.(9) The program aims at public enforcement of both child and spousal maintenance.

5.1.2 Overview of the Child Support Enforcement Program

Introduction

Title IV-D obliged the now Department of Health and Human Services to set up a Child Support Enforcement Office and each state was required to establish a separate unit to administer the IV-D program. The federal government sets enforcement standards, monitors state programs, keeps records of the program's operations, provides technical assistance to the states for management information services and maintains the Federal Parent Locator Service. Originally intended to serve both AFDC and non-AFDC families, in practice, there has been very little assistance provided to non-AFDC recipients. The following is an outline of specific services provided by the program.

(a) Federal Parent Location Service (FPLS)

Absent parents must be found to establish liability for and the amount of their maintenance obligations. The FPLS provides access to 'authorized persons' to HHS files and records and to any department, agency or instrumentality of the United States or any state, with disclosure restricted only in the interests of national policy or security interests or by the confidentiality of census data.(10)

In practice, access is being obtained from eight sources. Those services and the corresponding success rates are:

(i) Internal Revenue Service -- 60-70%(11)

(ii) Social Security Administration(12)
-- 66% on employment information
-- 6% on beneficiary information

(iii) Veterans Administration -- 33%(13)

(iv) National Personnel Records Centre -- 47%(14)

(v) Department of Defence -- 10%(15)

(vi) Department of Transport -- unavailable

(vii) Immigration and Naturalization Service -- unavailable

(viii) Railroad Retirement Board - unavailable

The FPLS has a computer facility within the Office of Child Support Enforcement (OCSE) connected to a nationwide telecommunications network. States with computer terminals have direct on-line access. Alternative contact methods exist for states with less developed systems.(16) States may have access to federal information without first exhausting state procedures.(17)

(b) Establishing Paternity

AFDC applicants receive financial incentives to co-operate in establishing paternity and are penalized where they do not do so.(18) However, attempts to penalize these mothers appears to be at the expense of the children.(19) On specified conditions, an exemption from co-operation is allowed.(20) Assistance in paternity determination is also available to non-AFDC families, on application and the payment of a reasonable fee.(21)

(c) Enforcement Mechanisms

The 1984 amendments provide for a mandatory system of wage withholding as well as state and federal tax intercepts on behalf of AFDC and non-AFDC families.

The federal tax intercept program, which existed prior to the 1984 amendments, has proved efficient and cost-effective. Substantial amounts (the average 1983 refund was approximately $530) are being recovered at low cost. It is felt that these monies would not have been collected by other means.(22)

(d) Federal Incentives for State Compliance

Since the inception of the CSE program, the federal government has supplied financial incentives to the states for administration of state programs, the development and improvement of computer systems and incentive payments for cost-effective enforcement. The incentive payments have resulted in a federal deficit for this aspect of the program which is otherwise judged to be cost-effective overall. The federal deficit for the year ending September 30, 1982 was $133,239,000.(23) The 1984 amendments institute a new system of financial incentives which rewards cost-effective enforcement for AFDC and non-AFDC families.(24)

5.1.3 The Child Support Enforcement Amendments of 1984

In 1982, the OCSE expressed concern about a downturn in collections for AFDC recipients, accompanied by increased expenditures.(25) A 1983 study attributed this to several factors, including fragmentation and lack of co-operation between administrative and judicial authorities, ineffective management and insufficiently tight financial incentives to the states.(26)

The new amendments were directed at correcting the following problems:(27) (1) an overemphasis on assisting AFDC families; (2) lack of uniformity in state paternity laws; (3) lack of automatic enforcement across the country; (4) variation in enforcement mechanisms; and (5) lack of uniform or standardized support awards.

With some exceptions, this extensive legislation generally came into effect on October 1, 1985. There are new responsibilities assigned to the states, including the provision of expedited procedures for obtaining and enforcing support (28); the establishment of child support guidelines, by law or judicial or administrative procedure by October 1, 1987 (29); the establishment of broadly representative child support commissions to evaluate state procedures (30); and, the frequent publicizing of IV-D services.(31)

Enforcement has been strengthened in several ways. The states are no longer required to exhaust their own procedures before having recourse to the FPLS.(32) The Secretary of HHS and the Secretary of the Treasury are authorized to release an absent parent's social security number to child support agencies.(33) All states must allow paternity determinations until a child reaches 18.(34)

A new system of automatic income withholding(35) has been described as 'the cornerstone of improved enforcement'.(36) All child support orders issued or modified after October 1, 1985 must provide for automatic wage withholding where arrears begin to accumulate.(37) A public agency must monitor the process, but alternative collection and disbursement procedures may be provided.(38)

Federal tax intercepts are extended to non-AFDC families(39) and state tax refunds must be intercepted at the request of the state CSE agency.(40)

New s.466(a) provides other enforcement mechanisms such as liens and security bonds.

Information disclosing the amount of overdue support owed by an absent parent will be made available to any recognized consumer reporting agency, at the agency's request,

although the state may choose to withhold this information where arrears are less than $1000.(41)

5.1.4 Analysis of the Child Support Enforcement Program: Cost-effectiveness, Problems and Benefits

(a) Cost-effectiveness

The Child Support Enforcement Program has proven cost-effective. In 1983, child support collections totalled $2,023,416,000. The 1983 administrative expenditures for the program amounted to $690,902,000. The total child support collections per dollar of total administrative expenses were $2.93.(42) Of the total collections, approximately $880 million was collected on behalf of children receiving AFDC, while close to $1.15 billion was collected for non-AFDC families who had used local CSE agency services.(43) Although collections increased 14% over the previous year, spending in the program also increased by 13%, prompting the administration to urge more effective and efficient performances by the states.(44)

In 1983, federal incentive payments to states and localities for AFDC collections totalled $120,718,000.(45) This aspect of the program incurs a federal deficit. The pre-1984 structuring of incentive payments meant costs to the federal government exceeded the amount it recuperated in welfare reimbursement. The most recent figures available show that, in 1982, the federal government incurred a deficit of $133,239,000.(46) OCSE costs, which amounted to $16,638,303 in 1982, are independent of the states' expenses and not directly connected to the IV-D program, but should be considered in cost-effectiveness estimates.(47)

Although it was estimated that the CSE program would allow the government to recoup between 25% and 30% of AFDC payments (48), in 1982, only 6.8% of these payments were actually recovered.(49) Nevertheless, the overall program is cost-effective. In 1982, $1.33 was collected on behalf of AFDC children for every dollar of total administrative expenditures and, as noted supra, the ratio for total child support collections to total administrative costs was even higher.

(b) Problems

The American approach to child support firmly places primary responsibility on the legally responsible absent parent. The CSE program is an attempt to ensure that supporting parents meet their obligations, thereby reducing welfare expenditures. This resource-oriented approach is not without problems. In 1984, more than half of the American families owed child support were not receiving payments.(50) In 1982, the Administration expressed concern

that, exclusive of the income tax refund offset program, there was a continuing expenditure growth. The concern is that at some future date, cost-effectiveness will not be an achievable goal.(51) One problem that arises in this context is the practice of 'priorizing' or 'creaming' AFDC cases which are relatively easy to enforce. This practice has been promoted by the OCSE.(52) Prioritization increases short-term collections but collection rates decline over time as more difficult cases are reached. However, it appears that most jurisdictions do not follow OCSE guidelines and tend to select cases for enforcement on a random basis. As the Australian National Maintenance Inquiry points out:

> 'In the light of such developments, the notion of cost-effectiveness as a primary rationale for a child support system must be questioned: other socially and morally based rationales (such as society's interest in enforcing the support obligation so as to best protect the interests of children, and so as to encourage respect for the law and a sense of personal responsibility and to promote parental equity in the sharing of economic responsibility for children) are arguably of at least equal importance. It seems that U.S. federal officers themselves regard 'prioritization' as a resources issue and have stressed that it does not mean, however, that States can avoid providing a range of services able to handle all cases.'(53)

It remains to be seen how effective the 1984 amendments will be in improving the CSE program. If the program fails to remain cost-effective, the rationale of child support will have to be re-examined. A recent study which examined, inter alia, the relationship between AFDC recipiency and the receipt of child support concluded, in part, that single mothers receiving child support were significantly less likely to receive welfare than single mothers receiving no child support. However, this study also found that child support alone had a fairly limited impact on welfare recipiency, partly due to low award levels. This study stated that higher award amounts and/or other sources of income appear necessary to significantly reduce welfare dependency.(54) At present, the OCSE is concentrating on improving collections. It feels that greater commitment and involvement of state and local governments can combat poor collection rates.(55)

(c) Benefits

The CSE program has provided significant benefits both to those making use of CSE services and to federal, state and municipal governments. Although non-AFDC families must pay a service fee, this payment gives them access to the full range of enforcement services, thus shifting the

enforcement burden onto the state, which is much better equipped to handle enforcement.

A 1978 study demonstrated that some 99,000 families would be receiving public assistance if it were not for the child support payments being received because of the CSE program. The net savings estimated were $326 million annually. The OCSE has expressed reservations about the accuracy of these figures but they do indicate a significant impact. Another evaluative study concluded that cost-avoidance achieved as a consequence of the non-AFDC program occurred not so much through keeping families off public assistance, but rather through reduced demand on other non-AFDC benefits such as food stamps and medicaid. This study found that the majority of non-AFDC clients did not apply for public assistance on failing to receive child support. OCSE has questioned the findings of this study also, so that it appears that all that can be said about cost avoidance is that welfare costs are reduced but it is impossible to accurately determine these amounts.(56)

Other benefits accrue from the program. In 1982, 781,913 absent parents were located, 173,621 paternities were established and 468,537 support obligations were established.(57)

The benefits to non-AFDC clients depend on the priority assigned to their case. It remains to be seen whether or not the 1984 amendments will improve the comparatively poor services these clients have received in the past due to the overemphasis on AFDC collections.

AFDC clients will receive direct financial benefits from the enforcement program where the state collects more from the absent parent than is owed to the state to reimburse assistance payments to the family.(58)

AFDC clients for whom support has been collected and who cease receiving AFDC are, under the new legislation, automatically transferred to non-AFDC status with reapplication or an application fee. These families must continue in the IV-D program for a three month period after which they may elect whether or not to continue receiving IV-D services. If they opt for state enforcement, they will be required to pay the same service fees as any other non-AFDC family.(59)

All levels of government are recuperating welfare expenditures. Although the federal government incurs a deficit, the states' efforts are very cost-effective. In 1982, the state share of administrative expenditures was $148,079,172, while the state share of AFDC child support collections was $353,747,596.(60)

5.2 Michigan

5.2.1 The Office of the Friend of the Court: Overview

Michigan is an example of a state with an automatic enforcement system administered by the state. This is done through the Office of the Friend of the Court. This administrative agency has been in existence since 1919.(1) New legislation governing the Office's responsibilities and role in enforcement came into effect on July 1, 1983.(2) The Friend of the Court has informational, counselling and consultative duties as well as investigative and enforcement duties regarding custody, visitation and child support.

Prior to adjudication on family matters, the Friend must inform the parties of court procedures, of the availability of mediation and counselling services and of joint custody.(3) The court may request the Friend to make investigations and recommendations on the amount of child support.(4) Subsequent to adjudication, acting as a 'referee'(5), the Friend hears all motions in domestic matters, except motions to vary the amount of support, referred to the referee by the Court; receives, records and disburses support payments; and, must initiate and carry out enforcement proceedings for all orders entered in domestic relations matters regarding custody, visitation and support.(6)

5.2.2 Automatic Enforcement in the State of Michigan

Michigan's automated, self-starting enforcement system is a court-based system with no provision for the registration and enforcement of voluntary agreements. The Friend of the Court must begin enforcement proceedings 'without awaiting complaints from the support recipient.'(7)

The principal enforcement mechanism is a system of prospective income withholding. Where this proves ineffective, contempt proceedings may eventually result in jail.

The new legislation provides that all support orders must have a prospective wage withholding provision.(8) Under specified conditions, the debtor is notified that the withholding will take effect 14 days after notice unless he/she either requests a hearing or pays up.(9) For cause or at the request of the payor, the income withholding order can take effect as soon as the support order is entered.(10) Special provisions integrate pre-July 1, 1983 orders into the system.(11)

Where arrears reach a statutorily specified level, (four weeks (12), as of January 1, 1985), the Friend of the Court begins enforcement with warning notices to the debtor.

Where income withholding is inappropriate or unsuccessful, contempt proceedings are undertaken.(13) The court presumes current resources equal to more than four weeks' payment unless the contrary is proven. The presumption will not be made however unless the Friend of the Court or support recipient proves the resources. Where the debtor has the ability to pay all or some portion of the support order out of current resources, the debtor will be found in contempt (14), resulting in committal for up to 45 days on a first adjudication and up to 90 days on any subsequent adjudication, unless the amount ordered is paid earlier.(15) The same penalty is available where the debtor has failed or refused to pay and the court is satisfied that by 'the exercise of diligence' the payer could have the capacity to pay all or some portion of the amount due.(16) Any of the debtor's earnings while in jail are generally applied to support or to repay social services payments the family may have received.(17)

5.2.3 Enforcement Administration

(a) The Office of the Friend of the Court

The Offices appear to function at varying levels of efficiency across the state. Although the system has been found to be self-starting in all welfare cases, the same could not be said to have been true in all non-welfare cases. Considerable variance exists in frequency of account reviews, size of operations and jailing rates. There is no uniform or clearly defined view of the Friend's role which may be due to a wide range of professional backgrounds and training of the individual officers.(18)

(b) Office of Central Registry

This office, a division of the Department of Social Services, is the state information office for interstate (URESA) actions. It also administers the Co-operative Reimbursement Program which funds the counties and locates absent parents when local resources are exhausted.(19)

(c) Support Specialist

This person is also located within the Department of Social Services and is responsible for the general supervision of cases in the hands of either the district attorney or Friend of the Court. Essentially, this person acts as liaison between the various officials in the support process.(20)

5.2.4 The Chambers' Study of Enforcement in the State of Michigan

The Chambers' study was conducted over a seven year period between 1972 and 1978. Although it predates the recent revision of the Friend of the Court legislation and the 1984 federal amendments to the CSE program, its findings still retain considerable value because two of the essential features of the older Friend of the Court legislation (the enforcement role of the Friend of the Court and the use of jailing) remain.

Chambers examined enforcement practices in 28 of Michigan's 30 counties. These 28 counties accounted for 85% of the Michigan population at the time of the study. Chambers' data were obtained from the files of the Friend of the Court in the counties studied.

(a) Significant Factors Affecting Collections

Chambers tested over 100 factors to determine why some counties had dramatically better enforcement results than others. He concluded that the three significant factors were: an aggressive, self-starting enforcement system coupled with an equally aggressive pursuit of the debtor, resulting in a high jailing rate and taking place in a county with a small population. Self-starting enforcement and high rates of jailing are given an additional boost where the population is small. Chambers noted that the county with the lowest population had the highest collection rate and the reverse was true in the most populous county studied. In the small high collecting county, Chambers noted '(s)omeone on the staff (of the Friend of the Court) knew where almost every father lived, worked or drank'(21) and attributed a substantial part of its collection success to its 'cozy manageability.'(22)

(b) The Jailing Factor

Chambers was able to conclude that it is the incidence of jailing and not the length of sentence which produces successful results.(23) Related findings showed that the length of the jail term had no effect on weekly payments after the debtor's release but the number of days served actually had a strong negative relation to post-release payments.(24) The numbers of men leaving the county after release from jail was significantly higher among men held for longer terms.(25)

(c) Characteristics of Men Being Jailed

Chambers was unable to definitely conclude that there was a specific bias in the enforcement process. Nonetheless, he felt that 'undesirable though unmalicious factors influenced who went to jail.'(26) Some of these factors included dubious judgments about the debtor's ability to pay and an inherent arbitrariness in the decision to enforce. The majority of those jailed were unskilled blue-collar workers, a large percentage of whom were black, had alcohol problems, criminal records for other offences, high support orders in relation to their earnings and failed to attend predivorce interviews. The over-representation of black men was significant and almost 60% of jailed men had alcohol-related problems.(27) Chambers also found that men with alcohol problems were three times as likely to be rejailed even though the returns from repeated jailings were minimal.(28)

(d) Cost-effectiveness of Jailing Maintenance Debtors

Chambers concluded that the counties which had a self-starting enforcement policy and a substantial reliance on jailing collected, on average, 25% more than similar counties that did not have both policies, and the collections were greater than the costs of this policy.(29)

(e) Jail -- An Appropriate Remedy?

Chambers personally is not an enthusiastic supporter of jailing for non-support, although he concedes that it alters the behaviour to which it is addressed.(30) One of Chambers' reviewers asserts(31) however, that a sense of inevitability about the enforcement process is crucial to the attainment of substantial deterrence. Chambers' reservations about jailing have been examined and rebutted by Mnookin who essentially argued that jailing is an appropriate sanction and its defects do not make it theoretically inappropriate.(32) Chambers was in favour of a mandatory wage deduction tied to social security numbers.(33) He envisaged a portable scheme which would eliminate much of the existing enforcement system and allow for the standardization of awards in terms of percentages of wages to be deducted. The supporting parent's employer would have the onus of checking local social security offices for support orders against new employees. Chambers was more concerned about how individuals would feel about having their right to decide how to dispose of their earnings interfered with than he was about the administrative problems of such a system.(34) The new Michigan and federal legislation adopted the mandatory wage deduction in the form of wage/income withholding. The new Michigan legislation also reduced the civil contempt penalty from a maximum of one year to 45 or 90 days, depending on whether or not the adjudication was a first offence.

5.2.5 Analysis of the Michigan Enforcement System: Cost-effectiveness, Problems and Benefits

(a) Cost-effectiveness

Michigan has a longstanding record of successful support collection. Early in the IV-D program it ranked among the top 10 states with the highest collections.(35) In 1983, Michigan was one of only two states ranking at or above the national average for both AFDC and non-AFDC collections.(36) The total child support collections in 1983 were $273,799,000 while administrative expenditures for the child support enforcement program were $41,365,000.(37)

In 1983, $240,438,009 was collected under Michigan's child support enforcement program. The state share of administrative expenditures was $9,052,874 (the federal share was $27,158,623).(38) Michigan's share of the AFDC child support collections was $50,669,697.(39) Michigan was able to recover 12.9% of the AFDC payments through its child support collections (9.8% 1979; 9% in 1980; 9.8% in 1981).(40) Michigan recovered $6.64 in child support collection for every dollar of total administrative expenditures ($9.50 in 1978; 11.61 in 1979; $11.01 in 1980; $10.07 in 1981).(41) In AFDC cases, $2.80 was recovered per dollar of total administrative expenditures ($3.30 in 1978; $3.57 in 1979; $2.90 in 1980; $2.88 in 1981).(42) Part of the cost-effectiveness of the Michigan program can be attributed to the fact that the Office of the Friend of the Court had been in existence for a considerable period of time before the enactment of the federal program(43).

(b) Problems and Benefits

The comments in 5.1.4(b) and (c), *supra*, apply equally to the state of Michigan.

A particular problem that has been raised with respect to Michigan is the fact that the Friend of the Court has provided no assistance to obtain a support order in the first place. It has been suggested that having the Friend of the Court provide this assistance might compromise the neutrality of the court officer.(44) However, at least in AFDC cases, the federal law requires the states to establish paternity and secure support for these children.(45)

Overall, Michigan has a cost-effective program. In the most efficient counties, the system has been described as among the best in the world.(46)

5.3 Maintenance Enforcement in the Province of Manitoba

Introduction

The Family Maintenance Enforcement Program instituted an automatic monitoring and enforcement system as of January 1, 1980.(1) Like Michigan's, the system is court-based, requiring a court order to be eligible for enforcement services.(2) Receiving, recording and disbursing support payments and enforcement are the duties of a designated enforcement officer.(3)

5.3.1 The Family Maintenance Enforcement Program: Overview

(a) Support Orders and the Monitoring Process

Support orders have been largely standardized so that payments are on the 1st and 15th of the month. This information is stored in a central computer in Winnipeg to which the local enforcement officers have access through their local terminals. Payment records are transmitted to the central computer through a commercial telecommunications system.(4)

Maintenance creditors must remit their support payments to the 'designated officer.' The 'designated officer' maintains records of orders, support payments received and the disbursement of the support payments to maintenance creditors.(5) To fulfill monitoring obligations, records are reviewed twice monthly. Default records are forwarded to local offices. The enforcement office also contacts maintenance creditors to make them aware of the automatic enforcement system and ask if they would like collection assistance. Creditors may opt in and out of the system at will.(6)

(b) The Enforcement Procedure

A default (which includes insufficient payment) triggers investigative measures to locate the debtor and obtain information as to income and assets.(7) The enforcement officer may issue a warning notice or proceed with an examination of the debtor as to assets and default.(8) A computer print-out certified by the designated officer as being a true copy of the record of the account is admissible, on behalf of either party, as *prima facie* proof of the state of the account.(9) This is an important feature of the enforcement procedure because it eliminates the necessity of having the maintenance creditor give *viva voce* evidence or of swearing an affidavit as to the amount of the arrears. Notice does not have to be given to the other party of the intention to submit the print-out in evidence, nor does the signature of the designated officer on the certificate have to be proved.

Without issuing either warning notices or a default hearing, the enforcement officer may take other proceedings including realizing on bonds or securities, issuing garnishment or seeking to have the default penalty ($500 or 30 days) applied.(10)

Orders are subject to mandatory automatic enforcement where the creditor receives a social allowance or assistance.(11) As noted, supra, other creditors may opt in and out of the system. Statistics are not kept on the frequency of jailing maintenance debtors.

5.3.2 Analysis of the Manitoba Family Maintenance Enforcement Program: Cost-effectiveness, Problems and Benefits

A dramatic increase in payment levels was made in the first year of the program's operation. Maintenance payments received rose 70% in the first ten months of 1980 over the same period in the previous year.(12) In 1983, 8,554 orders were being monitored. A total of $741,597.12 was paid out either directly to the creditor ($94,801.34) or to the government ($646,795.78).(13) The total administrative cost for the 1982/83 fiscal year was $301,200. Of this amount,(14) the salaries of twelve staff positions accounted for $257,000.

No major problems appear to be encountered in the family maintenance enforcement program. The benefits however, are substantial. Manitoba is providing a very low cost enforcement system. The state has assumed responsibility for monitoring and enforcing regular payments so that maintenance creditors do not have to initiate enforcement or pay for legal representation at court hearings.

In August, 1983, approximately 85% of the orders in the system were being collected, as opposed to the estimated 75% default rate in 1975.(15) Both non-welfare maintenance creditors and the province are directly benefitting from these high compliance rates. The computerization of the system makes enforcement a speedy and efficient process.

Footnotes

5.1 Aid to Families with Dependent Children (AFDC) and the Child Support Enforcement Program

1. Office of Child Support Enforcement, HHS.

2. A Maintenance Agency for Australia, The Report of the National Maintenance Inquiry, Attorney-General's Department. (Canberra: Australian Government Publishing Service, 1984), at p.155.

3. Eichler, Margrit, Families in Canada Today, Recent Changes and their Policy Consequences. (Toronto: Gage Publishing Limited, 1983), at pp.179, 314.

4. Robins, Philip K. and Dickinson, Katherine P., Child Support and Welfare: An Analysis of the Issues, Final Report, prepared for the U.S. Department of Health and Human Services, Office of Research and Statistics, Social Security Administration. (Menlo Park, CA: SRI International, December, 1983), at pp.I-1-I-3.

5. Ibid., at p.I-3.

6. Fleece, Steven M., A Review of the Child Support Enforcement Program (1981-82), 20 J. Family Law 489, at p.493.

7. Social Service Amendments of 1974, P.L. 93-647 (Jan. 4, 1975), 88 Stat. 2351.

8. Omnibus Budget Reconciliation of 1981, P.L. 97-35 (Aug. 13, 1981), Title XXIII, s.2332(a), 95 Stat. 861.

9. Child Support Enforcement Amendments of 1984, P.L. 98-378 (Aug. 16, 1984), 98 Stat. 1305.

10. Supra, footnote 7, s.453.

11. Supra, footnote 2, at p.162.

12. Loc. cit.

13. Loc. cit.

14. Loc. cit.

15. Loc. cit.

16. Ibid., at pp.162-163.

17. Supra, footnote 9, amending s.453(f).

18. Ibid., s.101(c)(7).

19. Supra, footnote 2, at pp.170-171.

20. Supra, footnote 6, at pp.501 ff. An exemption is available under the following conditions:

    (a) where physical or emotional harm would result to the child;

    (b) where the mother would suffer emotional harm to the degree that the emotional impairment would substantially affect her functioning;

    (c) where the child was conceived through incest or forcible rape;

    (d) where legal proceedings for the child's adoption are pending;

    (e) where a competent agency is assisting the mother in deciding whether or not to give the child up for adoption;

    (f) where there is a reasonable anticipation of physical harm to the mother.

    The latter condition does not have to be documented where a past history of physical abuse has been established.

    This is a problematic area because the Office of Family Assistance (OFA) administers the good cause exemption and not the OCSE. There are inconsistencies in administering the exemption which appear to have been unnoticed by the OFA because it relies on regional perceptions of uniformity of application. Supra, footnote 6, at p.510.

21. Supra, footnote 7, s.454(6).

22. Supra, footnote 2, at p.322.

23. Ibid., at p.168.

24. Supra, footnote 9, amending s.458.

25. Seventh Annual Report to the Congress for the Period Ending September 30, 1982. U.S. Department of Health and Human Services, Office of Child Support Enforcement, December 31, 1982 (reprinted Dec., 1983), at pp.3 and 9.

26. Evaluation of the Child Support Enforcement Program: Final Report, Maximus Inc. (April 1983) cited in supra, footnote 2, at p.175.

27. For an examination of these issues see the Statement of the Women's Legal Defense Fund submitted to the Subcommittee on Public Assistance and Unemployment Compensation House Committee on Ways and Means on Title V of the Economic Equity Act.

28. Supra, footnote 9, amending s.466(a)(2).

29. Ibid., amending s.467.

30. Ibid., added by s.15.

31. Ibid., amending s.454 by adding s.454(23).

32. Ibid., amending s.453(f).

33. Ibid., amending s.453(b).

34. Ibid., adding s.466(a)(5).

35. Ibid., adding s.454(20).

36. National Center on Women and Family Law, Child Support Project, Information Release No. 6 (Children's Defense Fund, Washington, D.C.), at p.2.

37. Supra, footnote 9, adding s.466(a0(8).

38. Ibid., adding s.466(b)(5).

39. Ibid., adding s.466(2).

40. Ibid., adding s.466(a)(3).

41. Ibid., adding s.466(a)(7).

42. Statistics cited in the U.S. Code Congressional and Administrative News 981. Conference 2nd Session, No. 7, September, 1984, at p.2408. Source: Office of Child Support Enforcement; data revised as of March 28, 1984.

43. Ibid., Table 5, at pp.2412-2413 and Table 6 at pp.2413-2414.

44. HHS News release, February 28, 1984.

45. Supra, footnote 42, Table 9, at pp.2417-2418.

46. Supra, footnote 24, Federal Share of Administrative Expenditures ($444,289,106), at p.60; Federal Share of AFDC Child Support Collections ($311,050,239), at p.39. Also cited, supra, footnote 2, at p.168.

47. Ibid., 7th Annual Report to Congress, at p.30 and ibid., Australian National Maintenance Inquiry, at p.170.

48. Ibid., 7th Annual Report to Congress, at p.1.

49. Ibid., at p.86.

50. Supra, footnote 44.

51. Supra, footnote 25, at p.3.

52. Supra, footnote 2, at p.172.

53. Loc. cit.

54. Supra, footnote 4, at pp.ii-iii.

55. Supra, footnote 2, at p.176.

56. Ibid., at pp.167-168.

57. Ibid., footnote 25, at pp.78, 80, 82.

58. Supra, footnote 7, s.453.

59. Supra, footnote 9, amending s.457(c).

60. Supra, footnote 25, at pp.40 and 61.

5.2 The Michigan Enforcement System

1. Mich. Pub. Acts 1919, No. 412 and Mich. Pub. Acts 1921, No. 147.

2. Friend of the Court Act, Mich. Pub. Acts 1982, No. 294, M.C.L. 552.500 and Support and Visitation Enforcement Act, Mich. Pub. Acts 1982, No. 295, M.C.L. 552.600.

3. Friend of the Court Act, Mich. Pub. Acts 1982, No. 294, M.C.L. 552.500, s.5, M.C.L. 552.505.

4. Ibid., s.5(d), (e), M.C.L. 552.505.

5. Ibid., s.7(1)(a), M.C.L. 552.507.

6. Ibid., s.7(2), M.C.L. 552.507.

7. Ibid., s.11(1), M.C.L. 552.511.

8. Support and Visitation Enforcement Act, Mich. Pub. Acts 1982, No. 195, M.C.L. 552-600, s.4(1), M.C.L. 552.604.

9. Ibid., s.7, M.C.L. 552.607.

10. Ibid., s.5, M.C.L. 552.605.

11. Ibid., s.4(2), M.C.L. 552.604.

12. Supra, footnote 3, s.11(1), M.C.L. 552.511.

13. Supra, footnote 8, s.31, M.C.L. 552.631.

14. Ibid., s.33, M.C.L. 552.633.

15. Ibid., s.37(4), M.C.L. 552.637.

16. Ibid., s.35(1), M.C.L. 552.635.

17. Ibid., s.37(5), M.C.L. 552.637.

18. A Maintenance Agency for Australia, The Report of the National Maintenance Inquiry, Attorney-General's Department. (Canberra: Australian Government Publishing Service, 1984), at pp.185-186.

19. Ibid., at pp.186-187.

20. Loc. cit.

21. Chambers, David L., Making Fathers Pay. (Chicago: The University of Chicago Press, 1979), at p.97.

22. Loc. cit.

23. Ibid., at p.240.

24. Ibid., at p.238.

25. Ibid., at p.239.

26. Ibid., at p.210.

27. Ibid., at pp.206-208.

28. Ibid., at p.253.

29. Ibid., at p.101.

30. Ibid., at p.253.

31. Lempert, Richard, Organizing for Deterrance: Lessons from a Study of Child Support (1981-82), 16 Law So'y Rev. 513, at p.529.

32. Mnookin, Robert H. Review: Using Jail for Child Support (1981), 48 University of Chicago Law Review 338.

33. Supra, footnote 21, at pp.253, and 258-261.

34. Ibid., at pp.259-260.

35. Foster, Henry H. and Freed, Doris Jonas, Child Support in U.S. Jurisdictions, in The Child and the Courts, ed. by Baxter, Ian F.G., and Eberts, Mary A. (Toronto: The Carswell Company Limited, 1978), at p.166.

36. Statistics from the State Program Performance for Fiscal Year 1983, Ratio of Collections to Total Administrative Costs, Office of Child Support Enforcement, April 4, 1984.

37. Statistics compiled from the U.S. Code Congressional and Administrative News, 98th Congress, 2nd Session, No. 7, September 1984, at p.2411 (Source: Office of Child Support Enforcement; data revised as of March 28, 1984), and Seventh Annual Report to the Congress for the Period Ending September 30, 1982, Office of Child Support Enforcement, U.S. Department of Health and Human Services, December 31, 1982 (reprinted Dec., 1983), at p.41.

38. Ibid., Seventh Annual Report to the Congress, at pp.42, 40, 60.

39. Ibid., at p.61.

40. Ibid., at p.86.

41. Ibid., at p.88.

42. Ibid., at p.84.

43. Supra, footnote 18 at pp.188.

44. Ibid., at pp.187-188.

45. Social Security Act, s.454(4).

46. Supra, foonote 18, at p.187. Note, however, that anecdotal information indicates some criticism of the Office of the Friend of the Court for being less than helpful to users of its services because of allegedly overly bureaucratic administrative procedures.

5.3 Maintenance Enforcement in the Province of Manitoba

1. The Family Maintenance Act, S.M. 1978, c.25, as amended, Part V.

2. Ibid., s.31.1(5).

3. Ibid., s.31.1(4) and (5).

4. Information supplied by the personnel at the central office of the Family Maintenance Enforcement Program, Winnipeg, Manitoba.

5. Supra, footnote 1, s.31.1(3), (4).

6. Ibid., s.31.2(3).

7. Ibid., s.31.1(6)(a).

8. Ibid., s.31.1(6)(b) and s.31.1(9).

9. Ibid., s.31.1(9.1).

10. Ibid., s.31.1(10).

11. Ibid., s.31.2(4).

12. Press Release - Statistics released by the Manitoba Office of the Attorney-General, December 12, 1980.

13. Family Maintenance Enforcement Program Financial Statistics - Calendar Year Basis (1979-1983), prepared by N.C. Ralph, February, 1984.

14. Loc. cit.

15. Steel, Freda M., The Role of the State in the Enforcement of Maintenance in Pask, E. Diane, Mahoney, Kathleen E., and Brown, Catherine A., Women, the Law and the Economy. (Toronto: Butterworths, 1985), at p.215.

Chapter 6 THE WISCONSIN CHILD SUPPORT BENEFIT AND TAX SCHEME

Introduction

The result of a 1981 initiative to design and evaluate child support alternatives in Wisconsin is the child support benefit and tax scheme.(1) Parts of this scheme are presently being phased in, while others remain in the planning stages. Early versions(2) of this scheme appear to have undergone some modification. The discussion which follows outlines the components of this program and the stage of development as of October, 1985.(3)

6.1 The Parental Child-Support Obligation

All parents are obliged to contribute to their children's support, no matter what their income. Even very low income earners and imprisoned absent parents must contribute. The absent parent is required to pay a percentage of his/her gross income. The advantage in choosing a percentage over other formulae is seen to be the elimination of the need to make repeated applications for variation as the absent parent's income rises or falls. The present standards for the private support assessment are: 17% of gross income for 1 child; 25% for 2 children; 29% for 3 children; 31% for 4 children and 34% for 5 or more children.

At this time, the assessment formula is available to judges for their discretionary use. On July 1, 1987, this assessment will become optional but presumptive i.e., if a judge chooses not to apply the formula, he/she will have to justify this with written reasons. The presumption will be rebuttable only with 'clear and convincing evidence of unfairness.'

6.2 Child Support Enforcement through Income Withholding

Wisconsin's new program collects child support by mandatory income withholding at the source. This part of the program was piloted in 1982 and is presently expanding. By 1986, it is expected that 50 out of 72 counties will be collecting child support in this way. The process is overseen by the state IV-D agency. The IV-D agency cannot presently deal with a system of child support that is based on percentages other than manually. However, it is hoped that eventually the private support and enforcement procedures will be automated.

6.3 The Public Child Support Benefit

Wisconsin is proposing a public child benefit where the private obligation is either not met or falls below the

level of the proposed public benefit. The proposed benefit thus appears to be quite similar to the public maintenance advance systems outlined in Chapter 2. The proposed benefit is called an 'assured child support level.' The exact amount of the benefit has not yet been determined. While the state hopes to meet realistic costs of childraising, it is facing financial constraints. The waiver of federal regulations obtained in the federal 1984 amendments to the child support enforcement program has limited funds available to the state.

Initially, it was proposed that the public benefit be related to the absent parent's income.(4) However, it appears this has been rejected in favour of a flat rate benefit.

A random sample has been commissioned to determine who might be eligible for the assured child support level.

It is hoped that by March, 1986, this determination and the amount of the proposed benefit will be known. This aspect of the program is still very much in the planning stage. A pilot project is not expected before April, 1987.

6.4 The Child Support Tax

Wisconsin hopes to recuperate funds paid out as public child support benefits in the form of a tax on the absent parents who have failed to meet their private obligations. The tax will be primarily imposed on absent parents. However, the custodial parent will also be taxed where the tax on the absent parent does not pay back the full amount of public monies expended. The purpose of taxing the custodial parent is to assure that public monies are not being spent on children living in families that are not truly in need.

The exact mechanisms of this proposed tax scheme are still being worked out. It was proposed that the custodial parent's tax be calculated at year end and paid on the filing of annual income tax returns (5), as this was the most convenient way that a determination of the shortfall in the absent parent's contributions could be made. However, there is considerable concern that this may place an unexpected and unfair burden on the custodial parent. This tax scheme will be part of the pilot project being planned for 1987.

6.5 Analysis of the Child Support Benefit and Tax Scheme: Cost-effectiveness, Problems and Benefits

Clearly, no accurate estimation of cost-effectiveness can be made until the program is at least functioning as a pilot project. Estimates have been made based on different minimum benefit levels. Net savings are calculated as gross benefits minus absent and custodial parent tax revenues and

AFDC savings. While defects in the calculations are acknowledged (6), there is optimism that the program will be cost-effective. The current system collects approximately 65% of the absent parents' liability. It is hoped that the new program will increase this to 80%.(7)

While the cost-effectiveness can only be guessed at, some of the benefits of the new system are clear. The implementation of child support guidelines in the form of a percentage of gross income to be applied as a rebuttable presumption has several advantages. All absent parents will be treated equally unless circumstances are such that applying the presumption is clearly unfair. It remains to be seen how often and for what reasons judges will exercise their discretion not to apply the formula. The use of percentages should reduce court applications for variation to reflect changes in the absent parent's financial situation. The collection of private (and later, public) child support by income withholding at the source should make payments both more regular and hopefully, less difficult for absent parents.

Any specific problems must await evaluation until a reasonable time after the pilot project is undertaken.

Footnotes

1. Garfinkel, Irwin, Betson, David, Corbett, Thomas and Zink, Sherwood, A Proposal for Comprehensive Reform of the Child-Support System in Wisconsin, in Cassetty, Judith, (ed.), The Parental-Child Support Obligation. (Lexington: Mass.: D.C. Heath and Company, 1983), at p.263.

2. Supra, footnote 1 and also, Melli, Marygold and Zink, Sherwood, Alternatives to Judicial Child Support Enforcement: A Proposal for a Child Support Tax, in Eekelaar, John and Katz, Sanford M., (ed.), The Resolution of Family Conflict, Comparative Legal Perspectives. (Toronto: Butterworth and Company (Canada) Ltd., 1984).

3. Except where otherwise indicated, the information in this chapter was obtained in discussions with Wisconsin officials.

4. Supra, footnote 1, at pp.273-275.

5. Supra, footnote 2, at p.528.

6. Supra, footnote 1, at pp.276-281.

7. Loc. cit.

Chapter 7 FAMILY INSURANCE PLANS

Introduction

Marriage insurance plans have been proposed as an alternative way of dealing with the economic insecurity with which the single-parent family is faced. These schemes have been proposed in various forms but none have been met with any enthusiasm because traditional insurance principles are not easily applicable to the risks of marriage breakdown.

7.1 Voluntary Private Insurance

It has been suggested that couples might wish to purchase marriage insurance with benefits payable for a fixed term after separation or divorce in much the same way as life insurance is purchased. The term and rate of payment would be worked out with the insurer. If purchased by large numbers of couples and if the insured event (separation or divorce) occurred in a relatively small number of cases, the premiums need not be high.(1)

However, the problems with a voluntary scheme are legion. Firstly, in the same way that marriage contracts are not entered into in the common law provinces as a matter of course, few couples would be likely to embrace the idea of marriage insurance enthusiastically unless they had a particular economic interest in doing so. Chambers has suggested that those willing to participate voluntarily would fall into two groups: the first group would consist of couples who anticipated eventual problems from the outset of the marriage; the second group would consist of a few relatively well-off couples who might wish to use a marriage insurance plan as a kind of retirement savings plan.(2)

If large numbers of couples entered such a plan anticipating eventual marriage breakdown, this would result in 'adverse selection' i.e., within the pool of participating couples, the ratio of separating or divorcing couples would be disproportionately high in relation to the population as a whole. Insurers would be forced to demand higher premiums for the increased risk and would not be likely to see much profit in insuring such a group. The fact that the insured event is within the control of the insured parties opens the door to fraud and might actually provide a stimulus to couples with marginal incomes to separate.(3)

The numbers of well-off couples using marriage insurance as a financial investment and planning tool could be expected to be limited. The risk of fraud would exist in this situation also and it is difficult to see why insurers would be interested in setting up such private plans. Such a scheme would probably not be the best possible investment for these couples either.

7.2 Compulsory Public Insurance or Special Benefits

Compulsory public insurance is seen as being essentially an insurance plan in the nature of unemployment or health insurance. Compulsory marriage insurance plans have been proposed in both the United States and Canada.

An example of such a plan is the Matrimonial Support Insurance Plan (MSIP) proposed as a provincial social assistance plan for Alberta.(4) It is suggested that funding would be shared by private and public contributions. All married persons would pay a mandatory premium on a continuing basis until the age of 60.

The public funding would be through funds which would otherwise be funnelled into general social assistance. The MSIP funds would be offset by a correspondingly reduced need for social assistance and, theoretically, would mean no increase in government spending.(5) The private contributions would be collected through existing administrative structures such as the Unemployment Insurance Commission, provincial health care agency or through income tax. In the event of separation or divorce, a wife and dependent children entitled to support would receive a guaranteed income for three years or until her remarriage, whichever was earlier.(6)

In 1972 and 1973, two Bills were introduced into the New York Senate for the purpose of establishing a Commission to look into economic and social consequences of divorce and to undertake a feasibility study to determine the possibility of adopting a comprehensive family insurance program. Neither Bill passed and no feasibility study has been undertaken.(7)

Public insurance schemes are essentially an expansion of the social security system in that they would have to be mandatory and universal. Their attractiveness lies in the establishment of a guaranteed regular income, free from the stigma of welfare. Instituting such plans would establish legal contractual rights.(8)

This idea has, however, been much criticized. At the practical level, apart from the administrative and constitutional difficulties which would have to be resolved, the insurance plan would exclude illegitimate children unless some way could be found to include all potential parents and this seems unlikely.(9)

The cost of the plan (and therefore, the premiums) would have to be high since there are simply more children to be looked after on divorce or separation than there are parents to pay into the plan.(10) An increasing divorce rate would steadily add pressure to the demands on the fund.

It is unlikely that couples with low incomes would willingly accept the obligation to make substantial contributions towards a future statistical risk and better off couples might be no more willing to contribute even if better equipped financially to do so.(11)

Marriage insurance plans may be unfair in compelling all married couples to contribute, including childless couples, those with completed families and those whose children are of the age of majority. If private contributions were not mandatory, it is difficult to theorize about what sanctions could effectively be applied against those who refuse to participate.(12)

If marriage insurance plans are in fact an added feature to an existing social security system, they are open to the criticism that single-parent families are being given preferred status among other financially disadvantaged groups such as the handicapped or the elderly.(13) This view holds that what is really needed is a complete overhaul of the present social security system so that all financially disadvantaged Canadians be treated equally under a fair and comprehensive social security system.(14)

A 1973 Government of Canada Working Paper on the social security system recommended an additional income supplement for all those unable or not expected to support themselves through employment.(15) This would amount to a guaranteed universal income supplement. No major changes in this direction have been made to the legislation and without joint federal-provincial action, none can be anticipated.(16)

Footnotes

Family Insurance Plans

1. Chambers, David L., Making Fathers Pay. (Chicago: The University of Chicago Press, 1979), at p.262.

2. Ibid., at pp.262-263.

3. Loc. cit.

4. Bhardway, Vijay, An Outline of the Matrimonial and Child Support Insurance Plan: A New Law of Maintenance (1977), 28 R.F.L. 295. (For an abbreviated form of this proposal see Bhardway, Vijay, The Impact of Social Monogamy and Living Outside of Marriage on the Public and Private Law of Matrimonial and Child Support, in Marriage and Cohabitation in Contemporary Societies, Eekelaar, John M., and Katz, Sanford N., (ed.) (Toronto: Butterworths, 1980), at p.379 ff.).

5. Ibid., at p.300.

6. Ibid., at p.303.

7. Payne, Julien D., Public Law Alternatives to the Private Law System of Income Support for Family Dependents, extract from an unpublished report Income Support System for Family Dependents on Marriage Breakdown: An Examination of Fundamental Policy Questions prepared for the Institute of Law Research and Reform, Province of Alberta, June 5, 1982 in Payne, Julien D., Steel, Freda M. and Bégin, Marilyn A., Payne's Digest on Divorce in Canada (Don Mills: Richard De Boo, 1981), at p.82-834.

8. Supra, footnote 1, at p.263.

9. Ibid., at p.264.

10. Loc. cit.

11. Loc. cit.

12. Loc. cit.

13. Supra, footnote 7, at pp.82-834 to 82-835.

14. Loc. cit.

15. Working Paper on Social Security in Canada, Government of Canada, April 18, 1973, Proposition #7, at pp.23-24, cited in Payne's Digest, supra, footnote 7, at pp.82-833 to 82-834.

16. Supra, footnote 7, at pp.82-833 to 82-834.

PART III

SUMMARY AND PROPOSALS FOR REFORM TO THE PRIVATE AND PUBLIC LAW OF FAMILY MAINTENANCE IN CANADA

Chapter 8 SUMMARY OF THE FINDINGS IN PART II

Part I briefly examined some of the serious problems facing single-parent families in Canada today. These include: the disastrous economic consequences of family breakdown; the unacceptably high level of maintenance defaults; problems associated with fixing the level of maintenance awards; present difficulties in the enforcement process; constitutional difficulties arising from the shared federal-provincial jurisdiction in family law matters; and, the lack of integration between the private and public support systems for single-parent families.

Part II provides a description of specific policies developed by several countries to respond to these same problems. From the examination of the jurisdictions in Part II of this paper, several trends or common characteristics emerge. These conclusions are summarized as follows.

8.1 Maintenance (Private and Public) and Maintenance Enforcement

(a) Spousal Maintenance

In regards to spousal maintenance on marital breakdown, there is a clear movement towards characterizing the right to maintenance as being transitory, rehabilitative or even exceptional in nature. Spouses are expected to sever economic dependence within 'reasonable' time periods and to quickly establish or re-establish their economic independence. Switzerland presented the only contrary example. However, Swiss family law is presently undergoing considerable change directed towards making marriage a more equal sharing of responsibilities and privileges and one might expect some movement toward the trend evident in other jurisdictions examined.

The limited scope of alimony rights appears to be motivated by the policy that the economic consequences of family breakdown should not follow ex-spouses to any greater extent than other obligations. When a marriage is over, the partners to it should be allowed to disentangle all mutual obligations and go their separate ways as quickly as possible. However, it would appear that major factors which make this policy workable are a high participation rate of women in the work force combined with a fairly extensive social security system which provides the safety net for those either

unable to seek or obtain employment at a level sufficient for self-support or support of the dependent family.

Not only is the scope of alimony limited but the assessment of what is reasonable support often gives priority to the debtor's subsequent acquiring of new dependents. For example, New Zealand specifies that the debtor and his dependents are not to be deprived of a reasonable standard of living. This is a theme that reappears in child support considerations.

In short, spousal support in the jurisdictions examined may be characterized as transitory and rehabilitative as opposed to compensatory, and it is sometimes secondary to the debtor's responsibilities for a sequential family.

(b) Child Maintenance

Child maintenance is universally the responsibility of both parents, with the father, practically speaking, responsible for all or most of the financial contribution in marriage breakdown. While the right is usually expressed as being to reasonable or sufficient support, a large number of jurisdictions either already have or are moving towards an objective standard for measuring children's needs and parents' abilities to pay. Sweden has developed guidelines based on the needs of children at varying ages. Denmark has statutorily fixed standard maintenance levels for parents and pays out a standard maintenance to the children of impecunious parents. New Zealand's liable parent contribution scheme uses several formulae to assess a liable parent's contribution where his dependents receive a social benefit. Most recently, the U.S. federal government has passed legislation requiring all states to have child support guidelines established by October 1, 1987.

Where guidelines are already in existence, there is generally an extensive involvement of government agencies which have information or statistics allowing for the calculation of basic food, shelter and clothing costs for children at difference ages and in changing economic situations. These calculations are often indexed or revised annually or semi-annually with the supporting parent being required to adjust his payments according to these revisions.

In many jurisdictions, maintenance is also payable in advance.

With this type of assessment goes an increasing reliance on administrative assessments. Although court orders and private agreements are common to most jurisdictions, administrative agencies play roles varying from advisory to mandatory. In Michigan, the Office of the Friend of the Court may be requested by a court assessing child support to

investigate and make recommendations as to the amount of child support. The new U.S. federal child support enforcement legislation may even result in increasing administrative intervention as the new guidelines to be developed may be established by law or judicial or administrative procedure. There is a tendency in the Scandinavian countries to require an administrative confirmation of private child support agreements. In Denmark, the overwhelming majority of support orders are decided by administrative authorities who always decide quantum even where a court orders support. New Zealand requires private agreements to be registered. Where subjected to the scrutiny of administrative agencies, child support agreements can usually be varied as that agency sees fit and in keeping with the best interests of the child.

The actual calculation of the debtor's obligation often gives priority to sequential families or newly acquired dependents. Sweden and New Zealand, for example, specifically consider these circumstances. Sweden has worked out a fairly complicated series of calculations allowing the debtor to reserve specific amounts for his personal needs, including housing and the support of other dependents.

Adjustments are usually available for above-average income debtors to enable their children in need of support to benefit from this higher than average standard of living where administrative guidelines are in place (see Sweden, Finland and Wisconsin).

In Sweden and Finland, the child's ability to support himself is examined. Sweden looks not only at the child's income and assets but at his receipt of social benefits as well. This reflects a highly developed, well integrated system of assessing a child's global needs. The provision of social benefits responds, in part, to these needs and is reasonably to be considered in assessing the child's remaining financial needs. One assumes that the more generalized means and needs approach considers some of these factors as well.

(c) Enforcement of Private Law Maintenance Obligations

Every single jurisdiction examined makes the enforcement of private law maintenance obligations the responsibility of the state and not of the maintenance creditors. The enforcement takes place at various government levels, reflecting the political organization of the particular country.

Sweden has a central execution authority which operates through approximately 100 local offices. Finland puts enforcement in the hands of local sheriffs or bailiffs. Denmark makes enforcement a municipal responsibility carried

out by the local Social Welfare Boards, usually in conjunction with the municipality's fiscal administration or bad debt collection department. Switzerland legislated cantonal enforcement in 1976. Israel uses the office of the Chief Execution Officer, acting under the authority of the Execution Act. New Zealand provides maintenance creditors the assistance of maintenance officers within the Department of Social Welfare. The U.S. federal Child Support Enforcement Program was originally intended to serve both AFDC and non-AFDC families by obliging state enforcement. There has been an overemphasis on AFDC families, but the new federal legislation is aimed at making the states' enforcement agencies provide more equal enforcement services. This policy is reflected in Michigan's legislation. Manitoba presently provides enforcement services to maintenance creditors and has been doing so since the beginning of 1980.

Public enforcement is generally characterized by accompanying powers giving broad access to information banks, in some cases including those of revenue departments, with appropriate safeguards to control the distribution of this information.

These agencies also tend to have significant powers to intercept state payments to debtors to offset maintenance. Funds which may be diverted in this manner include not only income tax surpluses but also pensions and other benefits.

The priority given to maintenance debts varies. For example, in Sweden, attachment procedures take precedence over garnishment procedures thus priorizing maintenance claims. However, these maintenance claims are behind other interests such as taxes and other general charges, fines and penalties. (Insufficient information was available to make a real assessment of priorities assigned to maintenance claims in all jurisdictions examined.)

The preferred method of enforcement in the jurisdictions examined is some form of income withholding at the source. Some jurisdictions rely on a seizure of assets or jail for the self-employed. Very often, the administrative authority has the power to partially or completely remit the debtor's obligations for those who cannot meet their obligations due to factors beyond their control, such as ill health or unemployment. In Michigan, there is a high reliance on jailing where wage withholding proves either inappropriate or unsuccessful. Chambers' study of enforcement in Michigan indicates, inter alia, that it is the incidence of jailing and not the length of sentence which serves to produce successful results. Default jailing is also a last resort remedy in Denmark, Manitoba and New Zealand. In Switzerland, criminal sanctions may be used against defaulting debtors as well as civil sanctions.

(d) Public Law Maintenance of Children

All of the jurisdictions examined in this paper were originally selected because they provided some type of special benefit to children whose parents either defaulted on support obligations or were financially unable to contribute adequately to the child's maintenance.

These benefits are part of the social security structure and are separate and distinct from social assistance. This benefit is most commonly known as a maintenance advance, as it is based on the idea that the government advances funds owing but unpaid by the maintenance debtor. The state is subrogated to the creditor's rights and pursues the debtor to recover the public funds advanced. The roughly equivalent benefit in New Zealand is the domestic purposes benefit which is available to single-parents with dependent children. The non-custodial parent must be 'identified in law' to make these children eligible.

Eligibility requirements are usually directed to residency or citizenship and the condition that the parents are separated and the child is in real need.

The amount of the maintenance advance is determined in various ways. In Sweden, the advance is a fixed percentage of a 'basic sum' which is used in the calculation of a variety of financial rights and obligations. Finland has adopted a graduated scale for assessment and also varies the amounts with the conditions on which they were awarded. Denmark sets as a maximum the statutorily established 'standard allowance' on which parents' private law obligations are based. Switzerland has yet to establish uniform standards in eligibility and quantum due to constitutional difficulties centered around the fact that the cantons have complete autonomy over these matters. In Israel, the amount of the advance is either the amount of the judgment or the statutorily established amount for widows' and orphans' pensions, whichever is the lower.

In some jurisdictions, where the maintenance advance is set at a level higher than the private law obligation, the difference is paid to the child as a form of guaranteed minimum income (see Sweden, Finland). Denmark has a special allowance for the children of impecunious parents which would effectively provide the same thing. As noted, Israel advances the child the lower of the private obligation or the statutory limit. Switzerland has varied provisions. The Germanic cantons have developed a system similar to Israel's. In the Romanic cantons, the amount of the advance tends to be lower than the private obligation. Where the advance is lower than the private obligation, the state usually enforces for the higher amount, remitting the difference to the creditor.

One policy consideration raised is the amount of consideration that should be given to a child's own ability to be self-supporting. While theoretically, this should have been taken into consideration on the original private law assessment, in Switzerland it has posed a problem. Lack of consensus on this issue has, in some cantons, made it an eligibility condition. On purely theoretical grounds, a right established by a pre-existing private right should not be modified if eligibility conditions are met.

Funding for maintenance advances is generally from government revenues, the level of government reflecting the political organization of the state. The child benefit is a creature of federal law in all cases studied but is often administered at the local level. Funding comes sometimes from only federal revenues (Israel), is shared between levels of government (Finland) or is a provincial (state, canton) responsibility (Switzerland).

State enforcement seeks to recuperate funds paid out in advances. In several jurisdictions (e.g., Sweden, Israel, Finland), the state also enforces for maintenance over and above the amount of advance monies paid and remits these amounts to the creditors. In Switzerland, the legal characterization of the state's dual role in enforcing on both its own behalf and on behalf of the debtor has caused problems; however, a solution is being worked out to simplify and rationalize these proceedings.

Payment of the advance in no way diminishes a valid private support obligation which is not suspended by the child's receipt of the advance. New Zealand integrates the public and private law obligations through an administrative assessment of the liable parent's contribution where his dependent family is receiving a domestic purposes benefit.

Enforcement processes do not recuperate the totality of advance monies expended. In Sweden in 1983, 1.9 billion kr. was spent and 700 million kr. or approximately 23% was recovered. In the same year, Finland spent approximately 237 million Finnish marks of which approximately 38% was reimbursed. Denmark spent 841.6 million kr. in 1981. No figures are available for recovery rates. In Switzerland, the awarding and enforcement procedures vary too significantly for fair comparative evaluations. In some Swiss cantons, the advance system is completely funded by recovery procedures and, therefore, lack of success in enforcement cancels the advance. Recent statistics from Israel are unavailable, but the information at hand indicates that approximately one-third of the program costs have been collected. Collection rates in New Zealand show that the amounts received as a percentage of nominal value to reimburse the domestic purposes expenditures were 36.1% in 1982, 44.3% in 1983 and 48%

in 1984. In 1982, New Zealand collections offset between 6-7% of the expenditures.

The basic aim of the maintenance advance is to provide a guaranteed minimum income to a child suffering economic hardship because the supporting parent fails in his/her obligation. The hope is to raise the dependent family's income to a level above that of the subsistence provided by social assistance and to avoid, as much as possible, the negative associations of social assistance. The advance is a right on which the child may depend regardless of the behaviour of his parents. The advance is usually indexed and tax free. In Sweden, this is combined with a tax policy which allows working mothers who head single-parent families to retain virtually all of their net earned income. A recent study showed that this was a significant work incentive.

How many children become eligible for advance benefits? In Sweden, in 1983, approximately 11% of Swedish children, representing 53% of children in single-parent families received maintenance advances. In Finland, in 1983, approximately 8% of about one million Finnish children received the advance. Denmark paid advances to 164,939 children, representing more than one in eight children. In the first year of the Israeli program's operation, 1978, between 15% - 20% of social assistance recipients qualified for maintenance advances.

In the United States, cost-effectiveness is of major concern and the main thrust of the legislation has been to recover the highest possible rate of welfare expenditures. Thus, efforts have been concentrated on pressuring the individual states to improve enforcement techniques and results with the financial and technical assistance of the federal government. Wisconsin is embarking on a new child benefit which resembles the maintenance advance in its principal features. Wisconsin however will seek to recover child support benefits through the taxation of both the non-custodial and, in some cases, the custodial parent. Once again, new federal U.S. legislation has opted for a universal system of mandatory wage withholding as the most effective means of recovery. The overall U.S. child support enforcement program has proved cost-effective to administer and resulted in the removal of 32,000 cases from AFDC rolls in 1982. However, in 1982, the percentage of AFDC assistance payments recovered through child support collections was 6.8%.

In Manitoba, maintenance payments received rose over 70% in the first year of the province's family maintenance enforcement program. In 1983, $741,597.12 in collections were made at an administrative cost of $301,200, thus demonstrating that enforcement can be very cost-effective.

Thus it would appear that while enforcement costs may in themselves be cost-effective, they cannot be expected to recover either the full amount of private obligations owing or the costs of public expenditures necessitated by private default.

8.2 Maintenance Insurance Plans

An alternative approach to the support of broken families has been the proposals advanced for private or public insurance plans. Private insurance plans have built-in limitations due largely to control over the insured risk from which payment would result being in the hands of the insured. Public plans, modelled on health insurance or other public insurance plans would impose mandatory participation on all married persons. There would likely be much opposition to these plans due to the unfairness that might result from imposing this on childless couples but not on unmarried couples, thus disadvantaging children born out of wedlock. Given the fact that children would outnumber parents paying into such a plan, premiums would likely have to be fairly high. Such a plan might also be criticized as benefitting one group of disadvantaged Canadians over another. This might be a basis for challenge under the equality rights section (s.15) of the Canadian Charter of Rights and Freedoms.

Chapter 9 PROPOSALS FOR REFORM TO THE PRIVATE AND PUBLIC LAW SYSTEMS OF MAINTENANCE IN CANADA

Introduction

The present private law system of maintenance in Canada is undeniably inadequate in supplying the basic needs for single-parent families. As seen in Part I of this paper, maintenance awards are generally low and not always awarded on consistent principles or with adequate financial information available. The default rate on maintenance payments is unacceptably high. If the source of default is simple refusal to pay, a generally cumbersome, expensive and uneven system of enforcement may actually result in a rise in the standard of living of working non-custodial parents who have not contracted further family obligations, while the custodial parent and dependent children may all be forced into the poverty and degradation associated with a welfare existence. If inability to pay makes default inevitable, the original support orders cannot have accurately reflected the financial situation of the non-custodial parent and more aggressive enforcement can be expected to yield little. The result for the dependent family remains the same: welfare, a hand-to-mouth existence with which a host of social and economic problems are associated.

If there is to be a major commitment to improving the economic conditions of the single-parent family in Canada, one must look beyond traditional solutions to more sweeping reforms. It is submitted that the present federal-provincial initiatives as embodied in the Final Report of the Federal-Provincial Committee on Enforcement of Maintenance and Custody Orders in Canada do not go nearly far enough. While the suggested reforms are in themselves positive, they do not present a clear policy relating to the underlying social problems and only deal with one aspect, although clearly a significant one, of the greater problem. Strong enforcement measures are simply not enough.

The federal review of the social security system produced a consultation paper on the child benefit which essentially concentrated on adjusting the present system rather than looking to new solutions. These changes appeared in the May, 1985 federal budget which restructured existing benefits provided to families with children.

The suggestions which follow are drawn from the various jurisdictions looked at in this paper. Only a coordinated federal-provincial/territorial review and reform of the present social security and tax systems, and of provincial and federal laws regarding maintenance and the enforcement of these laws can provide new solutions. In 1975, the Law Reform Commission of Canada, in its working paper entitled Maintenance on Divorce, concluded:

> '...Given the constitutional division of legislative authority over matters that affect many significant features of marriage, Parliament...can really only accomplish part of the task. The removal of obstacles to the development of a new Canadian ethos of socio-legal equality for all married persons requires coordinated affirmative action by all governments and legislatures in Canada.'(1)

Any attempt to establish uniform legislative reform in the areas of awarding and enforcing maintenance orders must come to grips with the constitutional overlap in this area. It is beyond the scope of this paper to deal with these problems in great detail (2), but the problem areas have been highlighted in Part I as issues which must be specifically addressed in attempting a coherent and uniform reform of federal and provincial laws.

Similarly, proposals directed towards establishing a new federal child support benefit or maintenance advance to be at least partially recovered from defaulting parents would mean a strong commitment to federal/provincial/territorial cooperation.

Most of the proposals which follow are not new. They have already been advocated by legal scholars, Law Reform Commissions and practitioners for some time. However, an examination of the law and practice in other jurisdictions serves to reinforce existing proposals for reform by demonstrating workable solutions do exist. Also, studies and statistical findings in other jurisdictions are, if not authoritative, helpful in indicating trends in legislation and practice which may provide a new perspective for Canadian policymakers. The suggestions below have been divided into (1) proposals for change to the private law system of maintenance and (2) proposals for extensive reform of the public law as it relates to single-parent families.

9.1 Proposals for Change to the Private Law System

Introduction

Major reforms cannot be undertaken without studying means by which greater consistency or standardization in establishing maintenance and the associated enforcement process can be achieved. Three areas need considerably greater attention: pre-trial procedures, the process of awarding maintenance and maintenance enforcement procedures.

9.1.1 Increased Use of Administrative Support Services and the Administrative Assessment of Maintenance Awards

It is proposed that provincial governments consider the possibility of establishing administrative agencies to serve

as an adjunct to the present court processes in a manner similar to the Michigan Office of the Friend of the Court.

(a) Counselling, Conciliation and Mediation Services

In the initial stages of breakdown of the family unit, such an agency could provide counselling and conciliation services which might avoid the complete breakdown of the family unit or, if not, at least the emotionalism may be defused to a degree that would facilitate the resolution of financial obligations between the parties.

The Law Reform Commission of Canada recommended the use of counselling, conciliation and investigative (see infra) services to help resolve economic issues on divorce and in post-divorce litigation enforcement and variation of orders in 1975.(3)

Counselling and conciliation services of a Friend of the Court type of agency should be available to all couples whether or not they are married as long as they are contemplating divorce or separation. As in the Michigan legislation, there should be educational and experiential requirements for anyone functioning in a counselling or conciliating role and any personnel in this role should be excluded from intervening in other than a counselling role i.e., the same personnel should be excluded from any enforcement proceedings.

As the Law Reform Commission pointed out, where the use of social services, inter alia, would assist in resolving custody on divorce, the necessary procedures to be established would not pose 'substantial constitutional difficulties' but, practical difficulties would have to be resolved, such as the cost of providing these services(4) prior to a divorce adjudication. The Law Reform Commission felt such matters could be dealt with by either federal or provincial legislation or by rules of court made under provincial authority or under the provisions of the Divorce Act which empower the making of rules by either the divorce courts or the Governor in Council.(5)

A provincial agency could either develop its own counselling and conciliation units or draw on the expertise of the already established provincial departments of social services. Cost-sharing arrangements might be worked out with the federal government where such services are initiated after there has been a petition for divorce. Counselling and conciliation should probably be optional and not mandatory, but each party should be informed of the availability of such a service as soon as proceedings for either spousal or child support are undertaken under either provincial or federal legislation, or when application is made for

a social assistance benefit due to family breakdown. (See also, 9.1.5, infra.)

New Zealand may also be looked to as a jurisdiction with experience in counselling and conciliation procedures. The New Zealand experience seems to indicate that the success rate in counselling has a better chance of success if undertaken early. The success rate achieved when domestic purposes benefit applicants were immediately sent for counselling was higher than that for conciliation during separation proceedings (see Chapter 4, at 4.2.2, supra).

(b) Investigative and Reporting Services

When counselling or conciliation fail to resolve family relations disputes and separation or divorce is sought, these provincial agencies could be of further assistance if given investigative and reporting powers. The personnel entrusted with these tasks should have broad access to relevant financial information relating to either party in a domestic relations dispute, subject to normal restrictions on confidentiality of such information. If the financial investigating and reporting functions are specifically authorized by statute to be used at the request of the court and if the information is only to be transmitted to the court, adequate protection for the individual's privacy should be provided. A Canadian precedent for this already exists in the Manitoba legislation. Subsection 31.1(7) of the Family Maintenance Act provides very broad investigative powers to the 'designated (enforcement) officer'. Michigan's Friend of the Court has similar powers.

These powers would allow an objective third party access to financial data which could be used to verify the debtor's voluntarily supplied information. This could also short circuit any stalling tactics by the debtor in supplying information and would allow for establishing obligations in the same way in which New Zealand makes default assessments.

It is unlikely that the Canadian Charter of Rights and Freedoms would provide a basis for a successful challenge to legislation requiring disclosure of information of a confidential nature in federal or provincial data banks under s.7 of the Charter which guarantees:

> 'Everyone has the right to life, liberty and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'(6)

Section 1 of the Charter restricts the rights and freedoms in the Charter so that they are subject to:

'...such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'(7)

The moral and legal obligation of support is just such a principle of fundamental justice and any limitation on legal rights under s.7 would be reasonable.

In Regina v. Rolbin(8), the court upheld the provisions of the Income Tax Act which gave the Minister the power to require a taxpayer to provide any information including, inter alia, books, letters, accounts or other documents in the face of a challenge based on s.7 of the Charter. The Minister's powers were found to be within the 'reasonable limits' of s.1 of the Charter. It is likely such reasoning would apply equally to legislation authorizing extensive use of governments data banks. It ill becomes the defaulting maintenance debtor to complain about loss of privacy when his privacy claim is used to prevent the fulfillment of his legal and moral obligations towards his family.

The consistent use of detailed financial statements from both parties, verifiable from outside sources, would be a further aid to the calculation of support awards. It should not be a difficult matter to develop a standardized form which could be uniformly adopted by provincial and territorial governments across Canada. These statements should be required to be filed with any support agreement to ensure both parties have negotiated a settlement in possession of all the relevant facts as well as being required for judicial assessment purposes.

Minimally, administrative procedures could, therefore, be established to attempt a resolution of support issues prior to an adjudication on the matter.

It has been argued that adding an administrative process before access to the courts may incur extra delays and litigation expenses.(9) Michigan and New Zealand both demonstrate that an administrative solution may at least form a basis for the final form of a support order or agreement. If the administratively arrived at proposal does not receive the informed consent of both parties, access to the courts is always available. A neutral third party with experience and expertise in negotiating economic settlements may be able to achieve agreements not otherwise possible in a more adversarial context. If tentative proposals can be worked out on the basis of detailed financial information, it may, in fact, streamline the judicial process. If it is immediately apparent that no agreement can be reached on an economic settlement, time and money should not be wasted on protracted negotiations. In this situation the administrative officer should simply make recommendations for support in a report to be submitted to the court as one criterion to

be taken into consideration by the court on adjudication of the issue.

An initial administrative attempt to resolve economic matters may have the further benefit of making the whole adjudication process less intimidating to the parties and injecting an informational element into the process which is presently missing. It is clear from Wachtel and Burtch's study, (Part I, supra), that by the time maintenance debtors arrive at the show cause stage after default of payment, their behaviour shows obvious information gaps or misunderstandings about the judicial process as it relates to enforcing support. Again, as provided in the Michigan Friend of the Court legislation, such an agency could be required to furnish an informational pamphlet explaining the procedures of the court and court office, the rights and responsibilities of the parties, the availability of counselling, conciliation and other services to be provided by the agency.(10) Less formal oral explanations should also be available.

(c) Administrative Assessment of Support Obligations

It has been suggested here that minimally, administrative agencies play a support role as an adjunct to court proceedings. At the opposite end of the scale, these administrative bodies could be given the complete responsibility for making the actual maintenance assessments as is done in several jurisdictions in Part II (see, for example, Sweden, Finland, New Zealand). The administrative assessments would, of course, also deal with variations and the partial or complete suspension of obligations. This would require not only significant legislative amendments to the federal divorce legislation and to provincial/territorial legislation, but also, a resolution of the inherent constitutional difficulties. Granting extensive responsibility for maintenance assessments would be subject to constitutional challenge as effectively granting judicial powers to administrative officers. Section 7 of the Charter of Rights and Freedoms would allow for a challenge on the ground that the 'security of the person' guaranteed by the Charter would be denied without the benefit of judicial adjudication.

If the constitutional difficulties could be overcome, one advantage of moving towards administrative assessments would be that these issues could be settled on the basis of objective criteria, applied by personnel specialized in this area. Wachtel and Burtch (see Chapter 1, at 1(b), supra) noted that the court they studied tended to work with a few basic premises rather than getting into detailed accounting procedures. If maintenance is to come out of residual income, one should be able to develop guidelines (see 9.1.2, infra) such as those which exist in Sweden which allow debtors very clearly defined proportions of income based on

fixed costs. If corresponding guidelines for child support were developed, administrative assessment would be possible, with a final appeal to the courts. The courts need not be excluded from the process but would be reserved for contentious matters such as establishing the right to support and custody or property division. Removing support (and one must bear in mind that it is child support that is generally being assessed) from a negotiable package would ensure that the best interests of children are not going to be affected by being bargained away for some other part of a settlement.

If an administrative office were to have such broad powers, it would be important that a grievance procedure regarding the administrative office be available to protect the parties involved from any arbitrariness in the administrative process(11) and that the administrative personnel be subject to regular evaluations which would include input from those using their services.(12) The New Zealand procedures for objection, review and exemptions provide useful models for safeguards in the process.

It may be feared that the administrative assessment of support may be too slow or too costly. Legislation can establish reasonable time limits for interim and final decisions and decisions to vary or remit obligations. New Zealand provides very specific time limits for these decisions. As to the cost of such procedures, it is rather difficult to assess just what the reduction would be in court time saved and in a reduced demand on legal aid services.

Administrative assessments would not necessarily have to remove support negotiations from the hands of the parties. Where the parties can reach agreement, on the basis of informed use of mandatorily supplied financial information, such agreements should be encouraged; however, they could be subject to confirmation or variation by the administrative authority where obviously unreasonable or in changed circumstances (see, for example, Finland).

It is the development of support guidelines which would make the administrative assessment of maintenance possible. However, guidelines could also be incorporated in court-based assessments. Section 9.1.2 looks at the increasing trend towards adopting guidelines to determine support obligations.

9.1.2 The Use of Guidelines in Assessing Maintenance Awards

There is a growing movement towards the adoption of guidelines to assist in or govern the calculation of support awards. Several American jurisdictions have already attempted to establish guidelines (13) and will now be obliged to do so by the new U.S. federal legislation. Some form of guidelines exists in each of the Scandinavian countries

examined and New Zealand has also developed a complex set of formulae to assess the liable parent's contribution to support.

The wish is not only for simplicity but for the consistency which will imbue the support process with a fairness and even-handedness that will help eliminate disparities in awards made in similar circumstances. Many of the formulae examined in Part II are far from simple. Consistency in awards would also affect the maintenance debtor who should not perceive that he/she will be treated differently in any jurisdiction across the country. A coherent policy must be thought out to establish and priorize the factors to be considered in making support awards. Need and ability to pay are the most usual criteria, but as noted in Part I, supra, these terms are vague and ill-defined. On the one hand, their very vagueness allows for the full exercise of judicial discretion but this in itself has created problems of perceived or real inconsistency in awards in similar situations.

Bill C-47, the proposed new divorce law, sets out objectives for support in cl.15(6) and (7). This came as a response to the decision of the Supreme Court of Canada in Messier v. Delage (1983), 2 S.C.R. 401 in which the Court commented on the lack of guidelines in the present Divorce Act. The proposed objectives remain subjective although they do take into account specified factors and economic advantages and disadvantages arising from the marriage and its breakdown.

A movement towards adopting objective criteria in the other jurisdictions examined in Part II indicates that there is a fairly generalized dissatisfaction with the more subjective criteria. Without the use of standardized and detailed financial information and mathematical formulae whose consideration, at the very least, would form a starting point for awarding support, there will be little chance of developing a process which affords equal treatment to all people who must use it.

Any legislation aimed at establishing objective criteria for the assessment of maintenance should, ideally, include cost-of-living indexing to maintain the integrity of the original award. This is presently possible in Quebec under article 638 of the Civil Code and applies to support orders made under the authority of the Civil Code or under ss.10 and 11 of the Divorce Act.(14) Outside of Quebec, there is no consensus on the jurisdiction of the courts to index spousal or child support.(15)

The arguments in favour of the use of indexing as opposed to repeated applications to vary have been summarized by Dr. Gail C.A. Cook in this way:

'...First, the judges' and petitioners' time is used inefficiently when the change in circumstances results from a change in the general economic environment applicable to all recipients of payments as distinct from changes that are peculiar to a particular couple.

Second, there will be an unintended injustice borne by those who fail to petition for reconsideration whether this happens through their ignorance of the option, the cost of petitioning or their unwillingness to face the often emotional experience of further court appearances. Moreover, there will be more variability in how inflation is recognized in the absence of a clear-cut acceptance of the principle of indexing.

Third, the failure to include a provision for a cost-of-living index in the support order appears to be inconsistent with the judges' apparent constraint to deal only with the status quo at the time of judgment...'(16)

Adjustments would have to be made for regional variations in the cost-of-living. This information could be supplied by Statistics Canada. Appropriate protections would have to be implemented for the debtor whose wages or salary may well not be indexed but at least the indexation of support orders would ensure that the single-parent family does not suffer the primary consequences of economic downturns and high inflation. There is much opposition(17) to this idea. However, unless support orders are indexed, the real amounts awarded are severely eroded in difficult economic times and may well result in increased welfare costs. This area is one which needs considerable further study.

In Nova Scotia, s.36A of the Family Maintenance Act provides annual deemed cost-of-living increases in maintenance payments to persons receiving either provincial family benefits or municipal social assistance. The courts have declared s.36A a violation of s.7 of the Charter of Rights and Freedoms.(18) Section 36A has been attacked as violating the maintenance debtor's guarantee of security of the person because the debtor is deprived of personal property without the benefit of judicial adjudication. These cases also attack s.36A as abrogating the right to due process and thus offending the principles of fundamental justice. It has been called a legislative abuse of the courts' process and an illegal transfer of judicial powers to administrative officers. It has also been asserted that s.36A creates an irrebuttable presumption that the debtor's means have increased with the cost-of-living.(19)

These cases were decided prior to the coming into force of s.15, the equality rights section, of the Charter. Section 36A and any other automatic cost-of-living indexing

could now be challenged as being discriminatory if they were not of universal application.

It is submitted that some of the problems noted here might be avoided if proper advance notice were given to the debtor to allow him/her a reasonable time to oppose a proposed increase in maintenance payments. Automatic indexing and the fowarding of advance notices of intention to modify payments almost certainly necessitate a computerized monitoring program (see discussion at 9.1.3, infra).

The s.15 challenge might also be defused if the support provisions in the federal Divorce Act and in the provincial statutes were amended to give the courts the express power to index support awards in appropriate cases. If the appropriate awards were indexed, one might expect a limited number of appeals, thus avoiding the clogging of the courts with routine appeals.(20)

It is obvious that even if formulae or guidelines are adopted, they will not be susceptible of uniform application to all cases. One must remember that guidelines are exactly that; they do not have to be immutable rules subject to rigid, unthinking application. Judicial discretion would be limited but not eliminated. Even if guidelines are only a basis for initial calculations, they may succeed in removing support awards from being part of a bargainable settlement package to being considered a right which cannot be diminished.

With the combined resources of Health and Welfare Canada, Statistics Canada, Agriculture Canada, Canada Mortgage and Housing Corporation and other related departments or agencies, studies can be undertaken to determine support guidelines which incorporate the costs of child raising and the cost-of-living. An inherent fault in the present system is that the changing needs of growing children cannot be accounted for in the initial support award and therefore, the initial award has a built-in obsolescence. This means that variation may have to be sought a number of times over the life of an order, especially where the initial award has not been overly generous and has been based on a very narrow interpretation of 'need' on the determination of the order. Again, Sweden provides an example where formulae have been developed which are flexible and take into account the changing needs of growing children. The Swedish guidelines escalate the amount of child support in three stages from birth to 18 (see Chapter 2, at 1.1.2, supra).

Assessments, whether made administratively or judicially, can always be made subject to variation, review or appeal.

9.1.3 Improving Maintenance Enforcement

There is no real consensus on the reasons underlying maintenance default--there is no definitive answer to the question why men do not pay support. The Finer Report concluded men did not have the ability to pay, yet Chambers' study and the Michigan and Manitoba experiences seem to indicate that aggressive enforcement, which creates a climate in which maintenance debtors feel there is an inevitability about the enforcement process, results in significantly higher payment rates (see Chapter 1, at 1(b), supra). Enforcement strategies are necessarily developed in relation to the perceived basis of the problem.

The intensity of debate in this area indicates that it is not one susceptible of easy resolution and that a flexible approach needs to be developed. A more flexible approach would be to assume that both hypotheses have some validity, although the extent of their validity might be difficult to determine. Therefore, aggressive enforcement strategies should be developed and implemented on the assumption that many debtors simply do not pay because they do not want to pay and are aware that support obligations can be evaded with relative ease. However, for those who truly cannot pay, public law alternatives must be available for their families (see 9.2, infra).

Every Canadian province and territory should design and implement a computerized, self-starting enforcement program that would place the onus for monitoring and enforcing all support payments on the province or territory rather than on the maintenance creditor. The importance of every Canadian jurisdiction implementing an aggressive enforcement system cannot be overstressed. If maintenance debtors are to be 'encouraged' to fulfill their financial commitments to their families, they must feel that they will not only be assessed in the same manner before administrative bodies or the courts anywhere in the country when their obligation to support is being decided, but also, that it will not be possible to evade this responsibility by moving to any other jurisdiction in Canada.

Not only must the provinces have efficient intraprovincial enforcement, but computer systems must be linked across the country to provide effective interprovincial enforcement, with support from the federal government also. The U.S. IV-D program and the Michigan child support enforcement office provide an example on which federal-provincial cooperation might be modelled.

Bill C-48, the Family Orders and Agreements Enforcement Assistance Act, would allow the release of information for tracing purposes from the data banks controlled by the Department of National Health and Welfare and the Canada

Employment and Immigration Commission (s.15). Agreements with the provinces/territories must be concluded (proposed ss.1-3) and an administrative system for the release of the information (proposed s.4) in place before this remedy will become available. Also, designated provincial information banks must be searched before an authorization would be granted to search federal information banks (proposed s.4(b)). Note that the 1984 U.S. amendments eliminated the necessity for searching state data banks before access to federal data banks (see Chapter 5, at 5.1.3, supra).

Bill C-48 would also remove existing legal barriers to the garnishment or attachment of federal monies which will be designated in the Regulations. These will include federal income tax refunds and the provincial portion of tax refunds which the federal government is authorized to collect on behalf of the provinces. Once the necessary federal-provincial agreements were in place, these monies would be garnished or attached through existing provincial procedures (proposed ss.24-27).

The data collection necessary to facilitate the making and enforcement of maintenance awards makes a fairly sophisticated computer system mandatory. Minimally, each province/territory should have a centralized data bank to register all support orders whether given under federal or provincial/territorial legislation and to monitor payments so that defaults will be signalled quickly, enabling the enforcement process to be triggered without delay. To effect any significant improvement in intraprovincial enforcement, an automated system is the primary prerequisite. A manual system consumes too many personnel, is too slow and is too localized making information exchange slow and difficult. Change in the status of orders through default, variation or indexing must be noted quickly in order to have the appropriate response initiated without delay. Ideally, the provinces should be able to link their computer systems in such a way as to facilitate the transfer of information interprovincially, principally to prevent maintenance debtors from evading their responsibilities by changing jurisdictions. The interprovincial tracing of maintenance debtors would be further facilitated if access to federal information banks becomes a reality. If a coordinated computer system were to be established, it would be possible but difficult to conceive how such a system might work without a central coordinating agency which could set methodology and standards to ensure the uniform collection, classification and distribution of information. The U.S. Office of Child Support Enforcement provides an example of how such services may be provided.

An extensive computer system would be important in two ways. Firstly, the debtor would be more easily traceable to establish and enforce support obligations. An integrated

federal-provincial-territorial system would leave the debtor very few places to hide.

Secondly, if enforcement techniques were to include powers to garnish and attach or offset government payments against maintenance obligations owing, such as those proposed in Bill C-48, supra, it would be relatively easy to verify what government payments are owing to the debtor and to withhold and redirect them by using computer technology.

9.1.4 The Debtor and Subsequent Support Obligations

One issue deserves further attention because it may well be one of the pivotal issues in both determining ability to pay and also the debtor's willingness to cooperate with the enforcement process. This issue is the priority to be accorded to sequential families. There is no consensus in Canada on this issue, but it is one which must be dealt with in order to develop coherency and consistency in making and enforcing support awards. One must be realistic about the debtors' assumption of new support obligations and the claims they make. Canadians are divorcing at a relatively young age. In 1977, the median age for women to divorce was 32.6 and it was 35.4 for men.(21) Three out of four divorced persons remarry (22), and many others enter into non-legal unions. It is not surprising that the claims of a family with whom the debtor has day-to-day contact are foremost in the debtor's mind, and regrettable though this situation may be, the claims of the first family with whom the debtor has limited contact cannot help but diminish in importance over time although the legal obligation does not. It is significant that the countries studied which have accepted the debtor's assumption of subsequent obligations of support have accepted the responsibility for the first family in providing some form of special child benefit, preferring to allow the debtor to adequately look after one family rather than forcing him to try to support two. The debtor's private law obligation is often calculated with reference to the debtor's assumption of new dependents (see New Zealand, Sweden, Finland).

9.1.5 Assisting the Debtor

It appears evident from the findings of the Wachtel and Burtch study that some maintenance debtors did not clearly understand the roles played by the various levels of courts in awarding, enforcing and varying support orders. This study found that there was confusion or lack of factual information in the following areas:(23)

(a) The parties did not understand the functioning of the different levels of courts. It was apparent at show cause hearings that many debtors did not

understand that applications to vary, for example, had to be referred back to the original court;

(b) The parties did not understand that an enforcement court could not go behind the order and re-open issues nor did they know where to go to resolve collateral issues;

(c) The maintenance debtors often did not understand the significance of the show cause hearing nor its consequences;

(d) The enforcement role of the court was not understood. It was a source of mystery for some debtors as to why the court was acting for the maintenance creditor;

(e) Information was missing on how payments were to be paid. Some debtors appeared not to understand why judicial sanction was necessary for adjustments of payments in kind, in services for periods when children were visiting the payor, for gifts and other like contributions;

(f) Some debtors were surprised at being arrested and jailed for nonsupport; and,

(g) Some debtors did not know how an order for payment of arrears affected periodic payments.

If such information gaps and misunderstandings are present even for a minority of maintenance creditors, a better understanding of the roles of the various courts in the award and enforcement of support might avoid some defaults and remove an element of resentment at feeling unfairly coerced. No matter how unjustified this feeling may be, it may well contribute to some maintenance debtors refusing to pay. The information role which a Friend of the Court type of agency provides could help both parties know how variation and enforcement are obtained and what the obligations of the support order entail.

Ideally, Unified Family Courts should be able to deal with all issues arising from family breakdowns.

9.2 Proposals for Change to the Public Law System: Expanding the Role of the State in the Support of Single-Parent Families

As Professor Julien Payne has stated the problem:

'Constructive reforms can, no doubt, alleviate some of the adverse effects of the present private law system of spousal and child support. The policy objectives or

> goals of the private law system can be ascertained and statutorily defined so as to promote more rational and consistent judicial dispositions. Improvements can be made in the procedures for assessing spousal and child support. Mandatory financial statements and pre-trial procedures can reduce the contentious issues to be referred to the court and provide a more reliable foundation for determining the quantum of spousal or child support. The enforcement process can be strengthened to promote due compliance with court-ordered spousal and child support obligations. The injurious effects of the fault-oriented and adversarial system can be mitigated by changes in substantive law and by access to conciliation resources. These changes, however, cannot resolve the economic crises of marriage breakdown and divorce....
>
> ...A statute-based judicial system that provides for the equitable distribution of property on marriage breakdown and for the payment of reasonable spousal and child support is of no consequence to those who have no property and whose income is insufficient to support two households....
>
> ...Nor can the private law system of spousal support and property distribution adequately compensate the majority of 'displaced homemakers' who have committed many years of their lives to the family and consequently lack the qualifications to enter or re-enter the labour force.'(24)

The only alternative is an expanded role for the state in supporting the single-parent family. The state is already heavily involved financially through various transfer payments, subsidies and tax benefits or credits, but the approach has been a fragmented one --- the private system and the public system function together but not harmoniously and often with one system ignoring the existence of the other.

The issue of further state involvement in the furnishing of a guaranteed minimum income for single-parent families was explored in the mid-seventies by several provincial law reform agencies. Proposals to change from judicial to administrative procedures to regulate spousal and child support issues were favoured only by the Royal Commission on Family and Children's Law for the Province of British Columbia. None of the commissions favoured the state accepting exclusive responsibility for single-parent families in need of financial assistance.(25)

The Finer Committee did favour a guaranteed maintenance allowance to raise the level of income for single-parent families above the supplementary benefits level and to allow single parents a real choice between undertaking full or

part-time employment or staying in the home.(26) Its suggestions have not been implemented. However, the New Zealand liable parent contribution scheme owes much to the findings and recommendations of the Finer Committee.

In 1973, the Canadian government issued a Working Paper as a basis for federal-provincial discussions to review the Canadian social security system. Among its recommendations was a proposal for a universal guaranteed income for all Canadians who cannot reasonably be expected to support themselves.(27) A comprehensive revision of the social security system has not yet taken place, although the federal government, as noted in Chapter 1, has undertaken changes to child and elderly benefits.

It is submitted that the provision of a maintenance advance which would incorporate a guaranteed minimum income for children in single-parent families is the only realistic way in which the standard of living of these children can be raised to an acceptable level. Ideally, the benefit would be tax free so as not to diminish what the child receives, and payable until the age of majority unless the child's need terminated on some earlier, defined condition. If the maintenance advance were provided tax free, the present tax system which makes maintenance paid pursuant to a court order or written agreement deductible and taxes it in the hands of the recipient would have to be re-examined. These two concepts would have to be rationalized to avoid discriminatory tax treatment between creditors receiving private support payments and those receiving a public maintenance advance. The benefit would be administered federally to ensure uniform eligibility (provincial age of majority legislation would have to be dealt with) and coupled with an automated enforcement program.

If the awarding of a public child support benefit or advance were based on the same criteria as those used to assess private law obligations, there would be a rational integration of the private and public law support systems. One would want to avoid a system which requires the establishment of a private obligation and then ignores the extent of that obligation. The two will not always coincide. Where the private obligation falls below the national standard, the child, as already noted, would receive a guaranteed minimum income. Where the private law obligation was higher, the enforcement agency would direct this extra amount into the child's hands.

The resistance to the idea of a guaranteed minimum income for children in single-parent families would be based on the objections that (a) the cost would be prohibitive at a time when Canada has a substantial budget deficit which the federal government is taking strong measures to combat by restricting federal spending; (b) to furnish a guaranteed

minimum income to children in single-parent families would be to discriminate against other needy groups such as the aged and the disabled; (c) administrative procedures should not replace the exercise of judicial discretion by displacing the courts from the adjudication of complex issues; and (d) the constitutional difficulties would be insurmountable. In response to these concerns, the following comments may be made.

In the decade that has passed since these issues were most closely examined, the economic situation of single-parent families has become more critical. The divorce rate is very high.(28) High inflation and unemployment levels in recent years have badly hurt all Canadians and increased the burden on social assistance.

The cost of public support systems is always assumed to be prohibitive, but this is not clearly so. As Payne pointed out in his comments on the British Government's reaction to the Finer Report:

> '...The relative costs of administrative and judicial processes are unknown; the present indirect cost to the state of supporting separated and divorced spouses and dependent children by way of tax relief are unknown, and the comparative costs of present and future social assistance or guaranteed income schemes are unknown. It is not surprising, therefore, that governments are reluctant to implement proposals for fundamental changes in the private and public law systems of family support. A major reallocation of human and financial resources, the dismantling of established structures and the substitution of new and untried processes necessitates some degree of predictability respecting present and future costs and the prospective efficacy of the new systems.'(29)

It must not be forgotten that the consequences of lowered economic status are not financial alone. American studies appear to confirm that:

> '...There is growing evidence to suggest that children from broken homes are no more likely to suffer adverse social consequences such as criminal behaviour or academic failure than their friends from intact homes so long as the divorce or separation does not effect the economic status.'(30)

(Emphasis added)

Rare is the broken family whose economic status has not changed on separation or divorce.

If providing a child maintenance advance is arguably discriminatory, it is surely no more discriminatory than the present treatment that children from broken families (as opposed to all other Canadian children) are subjected to because of the defects in the existing system.

The advantages/disadvantages of administrative procedures have been examined, supra.

The constitutional difficulties in establishing a federal child support benefit would relate to the constitutional split between the provision of the benefit and the necessary enforcement administration. The benefit must be awarded federally to ensure uniform and universal access. Switzerland serves as an example where failing to implement at the federal level has resulted in varying eligibility and payment levels of the maintenance advance. However, the provinces/territories must enforce under their powers to administer justice. The benefit would be based on a prior judicial or administrative award of maintenance under private law statutes. However, as noted in section 9.1.3, supra, enforcement has proved cost-effective in the United States, Michigan being an example, and in Manitoba. This is an achievable goal.

If the enforcement of both private and public obligations were the responsibility of provincial enforcement agencies, adopting uniform enforcement legislation would be a major priority. A uniform series of procedures and remedies could be developed so that maintenance debtors would receive equal treatment in every province/territory. The costs of this agency might also receive federal funding for procedures relating to the recovery of federal child benefits paid.

The existence of a federal child benefit or advance would undoubtedly have a significant impact on provincial/territorial social assistance funds. In Israel, in the first year of its child maintenance advance program's operation, 15% - 20% of social assistance recipients qualified for the program (see Chapter 2, at 4.2.9).

The establishment of a federal child benefit or advance would mark a significant shift from placing primary responsibility for the children in single-parent families with insufficient means on the family to the public. Clearly, where private obligations can supply all of a family's needs, it would be preferable that the family retain this responsibility. However, it is increasingly evident that, for a large percentage of these families, this is a vain hope.

This shift would acknowledge that the debtor cannot always be expected to fully supply the needs of his

dependent children --- nor can single mothers. It should be noted that there has been a shift in emphasis in American policy away from encouraging the female heads of single-parent families to accept primary responsibility for family support by entering the work force. It has become clear that this may be too great a burden on these mothers especially where child care availability and quality cannot be assured nor employment remunerative enough to make these increased demands on single mothers worth the additional stress and responsibility. It also does not make sense to encourage these mothers into the work force while these problems are unresolved and then to provide a further work disincentive through tax policies which make no special concessions to working single-parent families (see Chapter 5, at 5.1.5, supra).

Fine-tuning the existing processes may provide somewhat better results but change of a more fundamental and comprehensive nature is needed to assure a growing number of Canadian children something better than a welfare existence and the limitations that imposes. Failure to intervene to assist these children may seriously hurt or impair the development of this generation of Canadians. This would be a terrible waste of a truly irreplaceable resource, and one which we must all depend on in the future. Canada has several countries to look to to furnish ideas to solve some of these problems. A strong commitment to change and a willingness to experiment with new ideas can ultimately result in innovative solutions tailored to Canada's particular constitutional, social, legal and economic systems. In order to affect a significant change to the economic situation of single-parent families, a clear policy must establish the extent to which private and public law rights can be relied upon and their interaction must be more clearly defined. Without a clear statement of principles, the two systems cannot be successfully integrated and further changes will only achieve piecemeal reform.

Footnotes

Part III Proposals for Reform to the Private and Public Law of Family Maintenance in Canada

1. Maintenance on Divorce, Working Paper 12, in Studies on Divorce, Law Reform Commission of Canada. (Ottawa: 1975), p.40.

2. For a more detailed discussion of these issues, see: Abols, Imants J., Custody and Maintenance: The Role of Provincial Legislation for Divorced Families (1980), 3 Can. J. Fam. L. 403; Bushnell, S. Ian, Family Law and the Constitution (1978), 1 Can. J. Fam. L. 202; Colvin, Eric, Family Maintenance: The Interaction of Federal and Provincial Law (1979), 11 Ottawa L. Rev. 541; Payne, Julien D., Maintenance Rights and Obligations: A Search for Uniformity (1978), 1 Fam. L. Rev. Pt. I, 2; Pt. II, 91; Pt. III, 185.

3. Supra, footnote 1, at pp.62-64.

4. Supra, footnote 1, Studies on Divorce, at pp.117-119.

5. Ibid., at p.117.

6. Canada Act, 1982 (U.K.), c.11, s.7.

7. Ibid., s.1.

8. Regina v. Rolbin (1982), 1 C.R.R. 186 (Que. Ct. Sess.).

9. Statement of the Women,s Legal Defense Fund submitted to The Subcommittee on Public Assistance and Unemployment Compensation, House Committee on Ways and Means on Title V of the Economic Equity Act.

10. See, for example, Friend of the Court Act, s.5.

11. Ibid., s.26.

12. Ibid., s.24.

13. See, for example, Chambers, David L., Making Fathers Pay, (Chicago: University of Chicago Press, 1979) at pp.38-42; Krause, Harry D., Child Support in America (Charlottesville, Virginia; The Michie Company, 1981), at pp.11-15; Payne, Julien D., Mathematical Formulae as Alternatives to Judicial Discretion in the Assessment of Spousal and Child Support in Payne, Julien D., Steel, Freda M. and Bégin, Marilyn A., Payne's Digest on Divorce in Canada, (Don Mills, 1983) at pp.82-724, 82-726 to 82-727; Friend of the Court Act, Michigan

Public Acts No. 293, July 1, 1983, s.19(1)(vi), M.C.L. 552.526.

14. For cases affirming this, see Payne, Julien D., Fighting Inflation: The Use of 'Cola' Provisions in the Resolution of Spousal and Child Maintenance in Payne, supra, footnote 13, at p.82-731.

15. Ibid., at p.82-732.

16. Supra, footnote 14, at p.82-734. Reprinted from Payne's Digest on Divorce in Canada by Julien Payne with the permission of Richard De Boo Publishers.

17. Ibid., at pp.82-735-82-740.

18. See, for example O'Keefe v. O'Keefe, August 21, 1984 and Red v. JDD, September 18, 1984, both heard in the Family Court of Nova Scotia.

19. Loc. cit.

20. Supra, footnote 14, at p.82-704.

21. McKie, D.C., Prentice, B. & Reed, P., Divorce: Law and the Family in Canada (Statistics Canada, February, 1983), at pp.97-98.

22. Ibid., at p.233.

23. Wachtel, Andy and Burtch, Brian E., Excuses: An Analysis of Court Interaction in Show Cause Enforcement of Maintenance Orders, Social Planning and Research, United Way of the Lower Mainland (Vancouver, 1981), at pp.57-59.

24. Supra, footnote 13, Payne, at pp.82-819 to 82-820. Reprinted from Payne's Digest on Divorce in Canada by Julien Payne with the permission of Richard De Boo Publishers.

25. Ibid., at pp.82-824 to 82-829.

26. Ibid., at pp.82-831 to 82-833.

27. Ibid., pp.82-833 to 82-834.

28. Supra, footnote 21, at pp.59-70.

29. Supra, footnote 13, Payne, at p.82-833. Reprinted from Payne's Digest on Divorce in Canada by Julien Payne with the permission of Richard De Boo Publishers.

30. Ross, H. and Sawhill, I., Time of Transition: The Growth of Families Headed by Women (1975), at pp.133-153 cited in the Statement of the Women's Legal Defense Fund, supra, footnote 9, at p.4.

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